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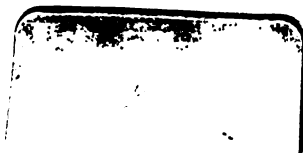
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# LOUISIANA REPORTS

VOL. 143

CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF  
LOUISIANA SITTING AT NEW ORLEANS AT TERM BEGINNING  
FIRST MONDAY OF OCTOBER, 1917, AND AT TERM BE-  
GINNING FIRST MONDAY OF OCTOBER, 1918

WITH CROSS-REFERENCE TABLES, TABLES OF CASES REPORTED AND CITED, TABLES  
OF CODE SECTIONS, LEGISLATIVE ACTS, AND ARTICLES OF THE  
CONSTITUTION CITED AND CONSTRUED

THIS VOLUME CONTAINS ALL CASES REPORTED IN THE  
SOUTHERN REPORTER ADVANCE SHEETS  
TO DECEMBER 14, 1918

EDITED UNDER THE DIRECTION OF THE COURT

ST. PAUL  
WEST PUBLISHING CO.  
1919

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MAR 28 1919

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JUSTICES

OF THE

SUPREME COURT DURING THE TERM OF THESE REPORTS

---

FRANK A. MONROE, CHIEF JUSTICE.

ASSOCIATE JUSTICES:

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WALTER B. SOMMERVILLE.	PAUL LECHE. <sup>1</sup>
BEN C. DAWKINS. <sup>2</sup>	

---

ATTORNEY GENERAL:

ADOLPHE V. COCO.

CLERK OF THE COURT:

PAUL E. MORTIMER, NEW ORLEANS.

<sup>1</sup> Retired December 7, 1918.

<sup>2</sup> Succeeded Paul Leche December 10, 1918.

# BAR EXAMINERS

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P. M. WELSH.

E. WAYLES BROWNE.<sup>3</sup>

<sup>1</sup> Reappointed.

<sup>2</sup> Deceased.

<sup>3</sup> Appointed January 15, 1919.



# AMENDMENTS TO RULES

## SUPREME COURT OF LOUISIANA <sup>1</sup>

### RULE XX.

#### EXAMINING AND DISBARMENT COMMITTEES.

It is ordered by the court that section 5 of rule XX of the rules of this court be amended so as to read as follows:

Section 5. The committee appointed from the members of the bar at, or near, Opelousas, shall exercise its jurisdiction over

applicants for admission to, and members of, the bar, residing in the territory comprising the parishes of Avoyelles, Cameron, Pointe Coupee, West Baton Rouge, Iberville, St. Landry, Evangeline, Acadia, Lafayette, Vermillion, St. Martin, Iberia, St. Mary, Terrebonne and Lafourche.

In effect November 30, 1918.

<sup>1</sup> For other rules, see 67 South. vii, 136 La. vii; 69 South. vi, 137 La. vii; 78 South. vii, 142 La. vii. 143 La. (vii) \*



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# LOUISIANA REPORTS

## VOLUME 143

### CASES ARGUED AND DECIDED IN THE SUPREME COURT OF LOUISIANA

AT TERM BEGINNING FIRST MONDAY OF OCTOBER, 1917  
AND  
AT TERM BEGINNING FIRST MONDAY OF OCTOBER, 1918

(78 South. 130)

No. 22739.

In re RECEIVERSHIP OF COTTON QUEEN  
OIL CO.

INTERVENTION AND OPPOSITION OF  
GRIGSBY et al.

(Feb. 25, 1918.)

*(Syllabus by the Court.)*

COURTS ~~6~~475(5)—RECEIVERS—JURISDICTION  
OF COURT.

With regard to their claims against a corporation whose affairs are being settled in a receivership proceeding, nonresident as well as resident stockholders and creditors of the corporation are within the jurisdiction of the court that appointed the receiver.

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Suit by J. H. Eastham and others against the Cotton Queen Oil Company, in which James G. Palmer was appointed receiver, and wherein W. E. Griggsby and others filed a petition in intervention and opposition. Exception to the jurisdiction of the petition in in-

tervention sustained, and the intervention dismissed, and interveners appeal. Judgment annulled, and case remanded for final disposition.

Hall & Bullock, of Shreveport, for appellants W. E. Griggsby and others. Alexander & Wilkinson, of Shreveport, for appellee Charles R. Porter.

O'NIELL, J. The appellants, residing in New York, filed a petition of intervention and opposition in receivership proceedings in the district court of the parish of Caddo. They alleged that they were the owners, and set forth the nature of their title, of two-fifths interest in certain shares of capital stock of the corporation, to the amount of \$48,500; that the stock was claimed by a nonresident of Louisiana, named Charles R. Porter, whose residence was not known by petitioners; and that the stock certificates were in the custody of Porter's attorneys (named in the petition), in Shreveport, La.

They alleged that the shares of stock were delivered to Porter under an agreement that he would collect the distributive dividends from the receiver and pay two-fifths of the amount to the interveners, but that Porter had collected from the receiver the first dividend of 10 per cent., \$4,850, and had retained all of it. They prayed for the appointment of a curator ad hoc to represent Porter; for service of citation upon the curator and the receiver; that the receiver be ordered to pay them two-fifths of all distributive dividends declared on the \$48,500 of capital stock; and that they be permitted to take from the second dividend what they were entitled to receive from the first and second.

One of the attorneys (alleged to have possession of the stock certificates) for Porter was appointed to represent him as curator ad hoc. He and the receiver pleaded that the court was without jurisdiction of the cause set forth in the petition of intervention. The plea was maintained and the intervention dismissed.

The district judge was of the opinion that the case was not an exception to the general rule that a personal action must be brought at the domicile of the defendant. He held that, as the absentee, Charles R. Porter, was the only defendant having an interest in the case, and as the capital stock in contest was not in the custody or within the jurisdiction of the court, notwithstanding the stock certificates were in the custody of Porter's attorneys in the parish, no judgment could be rendered declaring the interveners to be part owners of the stock.

Although the shares of stock, represented by the stock certificates, are not in the custody of the court, the fund in contest is in the custody of the court. The appointment of a receiver to take charge of the property and effects of a corporation is a judicial sequestration of the property. Article 126 of the Code of Practice provides that, when

there is a conflict of claims on property under seizure, whether by mesne or final process, all of the suits and claims upon the property shall be brought in the court having custody of it.

Other appropriate provisions of the Code of Practice are those relating to petitions of intervention and opposition. Article 393 provides that petitions of intervention should be addressed to the court in which the principal demand is pending; and article 397 declares that an opposition, whereby the opponent claims either the ownership of or a lien upon property that has been seized at the instance of another, must be made before the court that ordered the seizure.

In matters of failure of a debtor, or insolvency proceedings, all claims upon the property of the insolvent debtor must be brought before the court that has adjudged him insolvent. C. P. 165. We assume, from the averment that the receiver is paying distributive, liquidating dividends to the shareholders, and is thus winding up the affairs of the corporation, that the cause that gave rise to the appointment of the receiver was that the corporation was insolvent. Such a receivership is an insolvency proceeding, within the meaning of article 165 of the Code of Practice. *C. T. Patterson Co. v. Port Barre Lumber Co.*, 136 La. 60, 66 South. 418. All claims on the property of the corporation should be asserted in the receivership proceedings.

The interveners are not asking for a personal judgment that would be exigible or collectible by seizure of any property of Charles R. Porter. They are asking only for a share of a fund in the custody of the court. If Charles R. Porter is to be considered already the owner of the share of the fund that is claimed by the interveners, he could be brought into court, quo ad the fund, by substituted process and seizure of the fund under a writ of attachment. C. P. art.

240, par. 4; *Id.* arts. 254, 260. There was no occasion for an attachment in this case, because the property or fund in contest was already in the custody of the court.

Having received one dividend from the receiver, and being in court claiming the right to receive further dividends from the fund to be distributed, Charles R. Porter must be in court to defend suits that conflict with his claim on the fund to be distributed.

If the general rule, that a suit must be brought in the court of the domicile of the defendant, should be applied to a proceeding like this, it would apply as well to the stockholders and creditors residing in the state, outside of the territorial jurisdiction of the court in which the receivership proceedings are conducted, as to stockholders or creditors residing in another state.

The doctrine of the leading case on the subject (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565) does not conflict with the proposition that, with regard to their claims against a corporation whose affairs are being settled in a receivership proceeding, nonresident as well as resident stockholders and creditors of the corporation are within the jurisdiction of the court that appointed the receiver. The doctrine of the decision referred to is that, if the object of an action is to determine the personal rights and obligations of the defendant, that is, if the suit is merely in personam, constructive service of citation upon a nonresident is ineffectual. But the court then recognized and declared that substituted service, by publication or in any other authorized form, is sufficient to inform parties of the object of proceedings taken against property already brought under the control of the court by seizure or equivalent process; and that the law assumes that property is always in the possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him that it is taken into the custody of the court, and

that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

Our conclusion is that the court in which the receivership proceedings are pending has jurisdiction of the complaint set forth in the petition of intervention and opposition of the appellants.

The judgment appealed from is annulled, and the case is remanded to the district court for final disposition.

(78 South. 131)

No. 22574.

HOLSTEIN v. GUSS et al. GUSS v. POLICE JURY OF CATAHOULA PARISH et al. STATE ex rel. HOLSTEIN v. GUSS.

(Feb. 25, 1918.)

(*Syllabus by the Court.*)

1. OFFICERS §5 — ELECTION OR APPOINTMENT—LEGISLATIVE POWER.

Under articles 71, 72, and 171 of the Constitution, and Act No. 78 of 1906, construed together, the General Assembly is as well within its rights in declaring that an unexpired term of less than a year of a statutory office shall be filled by gubernatorial appointment, without the action of the Senate, as in declaring that an unexpired term of more than a year in such office shall be filled by election.

2. OFFICERS §56—VACANCY—POSSESSION—APPOINTMENT.

As two persons cannot, at the same time, fill a vacancy in the same office, it follows that the later commission is inoperative when the holder of the earlier, who remains in possession of the office, is not removed, and the indications are that the later appointment was made in error, either of fact or law.

Appeal from Eighth Judicial District Court, Parish of Catahoula; George Wear, Jr., Judge ad hoc.

Suit by Willis C. Holstein against John A. Guss, and mandamus by the State, on the relation of Willis C. Holstein, against John A. Guss, and suit for injunction by John A. Guss against the Police Jury of Catahoula Parish. Cases consolidated, and from the

single judgment rendered, Holstein, Guss, and others appeal. Affirmed.

Dale, Young & Dale, of St. Joseph, for plaintiff. R. M. Taliaferro, of Harrisonburg, and Stubbs, Theus, Grisham & Thompson, of Monroe, for defendant Guss.

#### Statement of the Case.

MONROE, C. J. The parties in interest in the above-entitled cases are Willis C. Holstein and John A. Guss, each of whom asserts that he was the de facto and de jure assessor of the parish of Catahoula for the year 1916, and is entitled to the compensation that may be due for the making of the parish assessment for that year; the police jury and the school board, by which bodies the compensation is to be paid, disclaim all interest, save that they may be protected in making the payment.

In the first of the suits, Holstein obtained preliminary injunctions prohibiting Guss from interfering with him in the discharge of his functions until he (Guss) should have obtained a judgment decreeing him entitled to the office in dispute, and prohibiting the police jury and the school board from paying him the salary. In the second suit, Guss obtained a similar injunction prohibiting the police jury from paying any part of the salary to Holstein. In the third suit, to which Guss is made a party, Holstein prays that he be decreed entitled to the salary, and that the police jury and school board be ordered to pay it to him.

The cases were consolidated by consent, submitted and decided (in favor of Holstein) upon an agreed statement of facts, and Guss prosecutes the appeal. The statement is rather elaborate, and we have reduced it to the following summary, to wit:

K. P. Holstein was the assessor, and his term would have expired on December 31, 1916; he died on January 23d of that year,

leaving a vacancy in the office; the then Governor (Hall) on January 26th appointed Willis C. Holstein to fill the vacancy, and the appointee, on February 19th, qualified as required by law and took possession of the office, with its books, papers, etc., entered upon the discharge of its functions, and from that time until the installation of the newly elected assessor on January 1, 1917, retained such possession, constantly asserting his right thereto. He received from the state auditor the blank rolls upon which the assessments were to be entered, began their preparation on May 10th, and, having completed the assessment, tendered one of the rolls to the tax collector on November 13th, and another to the auditor on November 21st, but those officers, acting on the advice of the Attorney General, refused to accept them. He tendered the third roll to the clerk of the court, who also at first refused to accept it, but did accept it in December 14th. In the meanwhile the Senate had convened, held its session, and adjourned; Governor Pleasant had been inaugurated as the successor of Governor Hall, and the appointment of Holstein had not been sent to the Senate for confirmation, and was never confirmed.

In the meanwhile also in July, 1916, Governor Pleasant had appointed Guss to the same office, "vice K. P. Holstein, deceased," and Guss, having qualified by taking the oath, etc. (though the Senate not having thereafter convened, his appointment was never confirmed), demanded the rolls which had been furnished to Holstein, and upon the refusal of the latter to surrender them obtained other such rolls from the state authorities, and also proceeded to make the assessment; and the rolls prepared by him were filed with the state auditor, the tax collector, and the clerk of court, respectively.

On July 23d Holstein presented abstracts of the rolls which he had prepared to the board of equalization, which board, at first,

refused to accept them, in view of the then recent appointment of Guss, but, the matter having been referred by the Governor to the Attorney General, that officer advised that the abstracts tendered by Guss could not be received, for the reason that Guss had not then qualified, and the abstracts tendered by Holstein were thereupon accepted and were acted upon.

It is agreed that neither Holstein nor Guss have brought suit under the intrusion into office act, and that J. W. Wright was elected to the office in question for a term beginning on January 1, 1917. It is also agreed that all suits now pending between Holstein and Guss concerning said office and its emoluments be consolidated and disposed of in one judgment. It is further agreed that Holstein was never removed from office, unless the subsequent appointment of Guss may have operated a removal, and that he never resigned or abandoned the office.

#### Opinion.

[1] The power to make original appointments and appointments to fill vacancies in office has been conferred upon the Governor, acting with the approval of the Senate, or upon the Governor alone by the Constitutions of 1868, 1879, 1898, and 1913, in substantially the same terms. Each of those instruments declares that the Governor "shall nominate, and by and with the advice and consent of the Senate appoint all officers whose offices are established by the Constitution, and whose appointments are not herein otherwise provided for," and each of them contains the proviso "that the General Assembly shall have a right to prescribe the mode of appointment to all other offices established by law" (or "appointment or election to all offices created by it"). Const. 1868, art. 60; Const. 1879, art. 68; Const. 1898 and 1913, art. 71. The Constitution of 1868 (article 61) vested in the Governor the power to "fill vacancies that

may happen during the recess of the Senate, by granting commissions, which shall expire at the end of the next session thereof, unless otherwise provided by this Constitution," subject to the restriction that no person who had been nominated and rejected should be so appointed to the same office. In the Constitution of 1879 (article 69) there was added to article 61 of the Constitution of 1868 the provision:

"The failure of the Governor to send into the Senate the name of any person appointed for office, as herein provided, shall be equivalent to a rejection."

And article 72 in the Constitutions of 1898 and 1913 is framed in the same language. Each of the Constitutions contain articles reading:

"The General Assembly may determine the mode of filling vacancies in all offices for which provision is not made in this Constitution."

"All officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office, except in cases of impeachment or suspension."

Const. 1868, arts. 120, 122; Const. 1879, arts. 160, 161; Const. 1898 and 1913, arts. 171, 172.

It will be observed that, whereas the power conferred upon the Governor to make original appointments is limited to offices created by the Constitution, and is subject to the condition that his appointments shall be made with the advice and consent of the Senate, the power to fill vacancies "that happen during the recess of the Senate," whilst not specially restricted as to the class of offices, is limited to the granting of commissions "which shall expire at the end of the next session" of the Senate, "unless otherwise provided for in this Constitution," or, as it reads in the present Constitution (article 72):

"The Governor shall have power to fill vacancies that may happen during the recess of the Senate, in cases not otherwise provided for in this Constitution, by granting commissions which shall expire at the end of the next session; but no person who has been nominated for office and rejected shall be appointed to the same office during the recess of the Senate. The failure of the Governor to send to the Senate the

name of any person appointed for office, as herein provided, shall be equivalent to a rejection."

The only other cases which can be said to be "otherwise provided for" in the Constitution are those which are within the contemplation of articles 71 and 171, which confer upon the General Assembly the right to prescribe "the mode of appointment or election to all offices created by it," and of "filling vacancies in all offices for which provision is not made in this Constitution"; and if article 171 does not authorize a mode otherwise than as provided in art. 72 of filling vacancies in offices created by the General Assembly and which that body is authorized to fill by original appointment, it is entirely inoperative, and, together with the words, "in cases not otherwise provided for in this Constitution," as used in article 72, might as well have been omitted.

We find, however, that from the beginning, i. e., from the first statute that was enacted on the subject after the adoption of the Constitution of 1868, the General Assembly has proceeded upon the assumption that there are offices the mode of filling vacancies in which are not provided for in the Constitution. Thus act No. 27 of 1868, which became a law but a few months after the adoption of the Constitution of that year, reads in part:

"Section 1. \* \* \* That whenever a vacancy occurs in any office, state, parish, or municipal, in this state, now existing, or which may hereafter be created, from death, resignation or from any other cause whatever the mode of filling which is not provided for in the Constitution, all such vacancies shall be filled, if they be state or parish offices, by appointment of the Governor, with the advice and consent of the Senate, which appointment shall be for the entire unexpired term of such vacant office. If the Senate be not in session at the time the appointment is made, the vacancy shall be filled by appointment by the Governor, which appointment shall expire on the third Monday after the meeting of the next session of the General Assembly thereafter, unless the time for which the vacancy exists expires sooner; and, if the time of such vacancy has not expired, it shall

then be the duty of the Governor to fill such unexpired vacancy by appointment, by and with the advice and consent of the Senate; and if it be a municipal office, the vacancy must be filled by appointment of the Governor for the unexpired term of the person whose office is so vacated."

It is clear that, if article 61 of the Constitution of 1868 in authorizing the Governor to "fill vacancies" (not all vacancies) occurring during the recess of the Senate by commissions which were to expire at the end of the session, had been then considered to apply to vacancies in statutory, as well as constitutional, offices, the General Assembly would have had no power to shorten the lives of such commissions to the third Monday of the session, and doubtful, to say the least, whether it could have gone beyond the Constitution and required the Governor, in cases in which the time of the vacancy had not expired, to make appointments to be confirmed by the Senate. But the General Assembly had the right to construe article 61 with article 120, which latter conferred upon it and not upon the Governor the power to prescribe the mode of filling vacancies in all offices for which provision was not made in the Constitution; and, concluding that the power conferred upon the Governor extended to offices which he was authorized to fill by original appointment, and the power conferred upon the General Assembly to offices, the mode of filling which it was authorized to prescribe, it prescribed, as the mode of filling vacancies in such offices, that of appointment by the Governor, subject to such conditions as it saw fit to impose; and the same view appears to have been taken in the enactment of Act No. 78 of 1906, which, after providing that the assessors throughout the state (the parish of Orleans excepted) shall be elected for terms of four years, declares (section 5, p. 124):

"That all vacancies occurring in the office of assessor, by death, resignation, failure to qualify, or otherwise, where the unexpired portion of



the term is one year or more, shall be filled by special election, to be called by the Governor and held within sixty days of the occurrence of such vacancy under the general election laws of the state. In all cases where the vacancy is less than one year, the Governor shall appoint for the remainder of the term."

The office of assessor, being of statutory creation, is clearly within the terms of the proviso of article 71 of the Constitution, which reserves to the General Assembly "the right to prescribe the mode of appointment or election to all offices created by it," and, as we think, of article 171, which confers upon the General Assembly the power to determine the mode of filling vacancies in all offices for the filling of which provision is not made in the Constitution, since our conclusion is that article 72 is intended to prescribe the mode of filling vacancies in statutory offices only in cases where the General Assembly has failed to exercise the power conferred upon it in that respect by article 171, and that the General Assembly is as well within its rights in declaring that an unexpired term of less than a year in a statutory office shall be filled by gubernatorial appointment without the action of the Senate as it is in declaring that an unexpired term of more than a year in such office shall be filled by election.

The case of *State ex rel. George v. Tucker*, 23 La. Ann. 139, does not appear to us to be altogether in point; and the case of *State ex rel. Meyer v. Van Tromp*, 27 La. Ann. 509, refers to no law, constitutional or statutory, and conveys but a vague idea of the facts upon which the decision rests. As it was decided in 1875, however, it could not have been affected by Act No. 78 of 1906, which, as we have seen, declares that a recess appointment to fill a vacancy of less than a year shall be made by the Governor for the whole unexpired term, and which, as applied to vacancies in statutory offices, we hold to be competent legislation.

[2] Counsel for defendant (Guss) does not,

in his brief, insist upon it that the mere appointment of his client operated a supersession of the appointment of Holstein previously made, or a removal of Holstein from the office, nor do we think that it produced these effects. Holstein was, unquestionably, the de jure and de facto assessor, under a commission which, assuming it to have been made agreeably to the provisions of Act No. 78 of 1906, entitled him to hold the office until the expiration of the term of his deceased predecessor, and as there could not have been two legal incumbents of the office at the same time, it was necessary that he should have been legally removed before the appointment of Guss could have taken effect. The commission which has issued to Guss, however, reads, "vice K. P. Holstein, deceased," from which it would appear either that the Governor was not aware that Willis C. Holstein had already succeeded K. P. Holstein, deceased, or else was of opinion that his commission had expired; and as there is nothing to indicate that he intended to remove W. C. Holstein, we are of opinion that the commission issued to Guss was inoperative for the filling of a vacancy that did not exist. *State ex rel. Downes v. Towns*, 21 La. Ann. 490; *State ex rel. Robinson v. McNeely*, 24 La. Ann. 19, 20; *Wood v. Inhabitants of Bristol*, 84 Me. 358, 24 Atl. 865.

The judgment appealed from is therefore affirmed.

(78 South. 134)

No. 22690.

NATIONAL CITY BANK OF CHICAGO v.  
BARRINGER et al.

In re NATIONAL CITY BANK OF CHICAGO.

(Jan. 28, 1918. Rehearing Denied March 9, 1918.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE — §155 — LOAN TO MARRIED WOMAN — RECOVERY — PROOF.

One who lends money to a married woman, domiciled in Louisiana, upon the authorization

of her husband, without that of the judge of her domicile, can recover it by suit only upon making affirmative proof that it inured to her separate benefit and was not borrowed for her husband or for the payment of his debts, or for the community.

**2. HUSBAND AND WIFE  $\S$  146 $\frac{1}{2}$ —WIFE'S CAPACITY TO CONTRACT—WHAT LAW GOVERNS.**

The capacity of a married woman, domiciled in Louisiana, to bind herself, or her property, by contract is determined by the law of her domicile.

O'Niell, J., dissenting.

Suit by the National City Bank of Chicago against Mrs. Georgia S. Barringer and husband. From a judgment of the Court of Appeal reversing a judgment of the district court in favor of the plaintiff, plaintiff applies for certiorari or writ of review. Application dismissed.

Hudson, Potts, Bernstein & Sholars, of Monroe, for plaintiff. Stubbs, Theus, Grisham & Thompson, of Monroe, for respondent Mrs. Georgia S. Barringer.

**Statement of the Case.**

MONROE, C. J. Plaintiff brought this suit against a married woman and her husband, domiciled in Louisiana, upon a note executed by her, in Louisiana, with her husband's authorization, but made payable in Chicago, given as the last of a series of renewals of similar notes, made and payable in Louisiana, the proceeds of which were used by the husband for his own purposes. There was judgment in the district court in favor of plaintiff, and, on the appeal to the Court of Appeal for the Second circuit, that judgment was at first affirmed, but on rehearing was reversed, and it is the judgment of reversal that we are now called on to review.

The facts of the case are as follows:

On June 23, 1911, Victor Barringer, the husband of the defendant, whose name appears in the caption, living with his wife in the parish of Ouachita, obtained from the Ouachita National Bank of Monroe, in that

parish, the discount of a note for \$2,000, executed by his wife, with his authorization, and secured by an act of pledge, similarly executed and authorized, of 20 shares of stock, the property of his wife. The note was renewed from time to time until 1913, when, through negotiations conducted by Mr. Barringer and the Union National Bank of Monroe, the National City Bank of Chicago agreed to take the place of the first lender, and a new note and act of pledge having been executed by Mrs. Barringer, at her home in Monroe, with the authorization of her husband, and delivered to plaintiff, it made its draft in her favor for \$2,000, less discount, which was forwarded to the Union National Bank, by which it was delivered to her husband, who obtained her indorsement thereon and turned it over to the Ouachita National Bank, in part payment of the amount due to it on the original loan. The evidence is uncontradicted and conclusive to the effect that Mrs. Barringer had no personal dealings with either of the banks with reference to the transactions in question, and made no representations to any one in regard to them; she merely signed, at the request of her husband, the different papers which he presented to her for signature, and none of the proceeds ever reached her, or inured to her benefit. The note to plaintiff was renewed at maturity, and, upon the nonpayment at maturity of the note given in renewal, plaintiff sold the pledged stock, and, after crediting the note with the proceeds, less various charges, brought this suit, alleging that Mr. Barringer had guaranteed its payment, and praying judgment against husband and wife in solido (though it appears afterwards to have taken a nonsuit as to Mr. Barringer) for \$2,000, with interest and attorney's fees, less a credit of \$714.02. The Court of Appeal, on the rehearing, set aside the judgment, rejected plaintiff's demand against Mrs. Barringer, and gave judgment in her favor on her de-

mand in reconvention for \$1,200, the amount shown to have been realized by the bank in the sale of the pledged securities.

### Opinion.

[1] It has been as well settled as anything could be in this state that since 1855, and prior to 1916, there have been two methods by which subject to certain conditions, a married woman has been capable of binding herself and her property in borrowing money; the one, by the mere authorization of her husband, or, in the event of his refusal to give it, by the authorization of the judge, after hearing the husband, in which case, the loan was made and accepted subject to the condition that, in the event of her raising the issue, or its being raised by her heirs, there could be no enforcement of her obligation unless the lender of the money proved affirmatively that the loan had inured to her separate benefit and not to the benefit of her husband or the community; the other method (provided by Act 200 of 1855, now articles 126, 127, 128 of the Civil Code) was by her obtaining the authorization of the judge, after an examination by him, separate and apart from her husband, concerning the purpose for which the money was to be borrowed, in which case, the law declared that, if he (the judge) should ascertain that either the money to be borrowed or the debt to be contracted was for the husband's debts, or for his separate benefit or advantage, or for the community, he should not give his sanction to the contract. On the other hand, if he became satisfied that the money was to be borrowed or debt contracted solely for the separate advantage of the wife, or for the benefit of her paraphernal or dotal property, he was required to furnish her with a certificate which would be the authority of a notary for drawing an act of mortgage, or other act which might be required of the wife as security, and such act, with the certificate attached, it was pro-

vided should furnish full proof against her and her heirs, and be as binding and have the same effect as if made by a feme sole.

It is, however, settled by the jurisprudence of this court that, though the burden of proof is shifted from the creditor to the debtor by the law thus referred to, nevertheless, if a married woman proves that the creditor has colluded with her husband to induce her to bind herself, or her property, for the benefit of the husband, or the community, or knew that the money loaned was to be so used, he cannot recover, since the transaction would be in fraud of the law. About the earliest case enunciating the doctrine that where the wife has only the authority of her husband her contract must be shown to have inured to her separate advantage is that of *Durnford v. Gross and Wife*, 7 Mart. (O. S.) 465 (1820), in which the husband and wife were sued upon a joint and several note, and the court held that the concurrence of the husband was sufficient authorization to the wife, but concluded by saying:

"In this case, therefore, no proof having been made that the debt contracted by the defendant jointly with her husband was applied to her use, in the manner required by law, we must say that the plaintiff cannot recover; and this view of the subject precluding the necessity of investigating the other points of defense, we dismiss their consideration."

In *Brandegee v. Kerr and Wife*, 7 Mart. (N. S.) 64 (being the first case upon the point that we find decided after the adoption of the Code of 1825), defendants, husband and wife, were sued on the note of the wife, indorsed by the husband, and received from the wife for a loan made by check delivered to her. Martin, J., in deciding the case, said:

"We therefore conclude that the circumstance of the wife having a separate advantage in the contract being of the essence of her obligation, must be proven by some other evidence than proof of her having touched the money. For, after receiving it, she may have handed it over to her husband, applied it to the wants of the family, employed it in relieving her husband from debts contracted for its support, or even

for other purposes, etc. Being of opinion that there is no fact in evidence from which it is possible to infer that plaintiff's money was employed for the separate use of the wife, in something that the husband was not obliged to furnish her with, we conclude that the wife is not bound."

In *Fireman's Insurance Co. v. Cross*, 4 Rob. 508, it appeared that the wife, authorized by her husband, gave a note secured by mortgage on her paraphernal property, and, being sued, denied that she had received any advantage therefrom, alleging that the transaction was for the benefit of her husband, as was well known to the plaintiff. The court said, *inter alia*:

"The article of the Code relied on, which forbids the introduction of evidence against, or beyond, what is contained in public acts, does not apply to contracts made in fraudem legis. If such an exception did not exist, and if it were not open to the defendant to show the real nature of the transaction, the laws made for the protection of married women would have no effect whatever. \* \* \* The circumstance of the wife appearing alone in the contract, as having borrowed the money with the authorization of her husband, cannot distinguish this case from those in which we have so frequently exonerated married women from contracts entered into jointly and severally with their husbands when it was not shown that the debt has inured to their benefit. \* \* \* It is for those who treat with married women to be upon their guard and see that the obligation that she contracts turns to her benefit and advantage." Citing 7 Mart. 484; 2 Id., N. S. 305; 5 Id., N. S. 431; 7 Id., N. S. 252; 8 Id., N. S. 692; 9 La. 587; 10 La. 147.

Other cases to the same effect are: *Gallon v. Matherne*, 5 La. Ann. 495; *Erwin v. McCalop*, 5 La. Ann. 173; *Hardin v. Wolf & Cerf*, 29 La. Ann. 333; *Nugent v. Stark*, 30 La. Ann. 492; *Calhoun v. Bank*, 30 La. Ann. 772; *Darling v. Lehman, Abraham & Co.*, 35 La. Ann. 1186; *West v. De Moss*, 50 La. Ann. 1349, 24 South. 325.

[2] The only other point that we find in the case is equally well settled, to wit, that the capacity of a married woman, domiciled in Louisiana, to bind herself by contract is determined by the law of her domicile. As was said by Eustis, C. J., in *Roberts v. Wilkinson*, 5 La. Ann. 372:

"The capacity of the appellant to contract, in ordinary cases, she being a married woman, domiciliated in this state, must be determined by our laws. The incapacity of a married woman to contract results from the relations which the law has established between husband and wife, and which are personal; and the laws creating the disabilities of minors and married women have always been classed among those which are called personal, \* \* \* in contradistinction to real statutes." Citing *Augusta Insurance Co. v. Morton*, 3 La. Ann. 417.

In the case cited it was asserted that the defendant had executed the notes sued on in Mississippi, but the court held that would have made no difference, if true, saying:

"The whole current of the decisions in Louisiana has negated the idea or possibility of defeating the effect of our laws which regulate the personal relation of its inhabitants by a mere temporary transit to another state, and any other conclusion would render those laws, and the necessary control of the state over to the persons and property of its citizens entirely nugatory."

See, also, *Hyman v. Schlenker*, 44 La. Ann. 108, 10 South. 623; *Baer Bros. v. Terry*, 105 La. 479, 29 South. 886; *Id.*, 108 La. 598, 32 South. 353, 92 Am. St. Rep. 394; *Marks v. Germania Savings Bank*, 110 La. 659, 34 South. 725; *First Nat. Bank v. Hinton*, 123 La. 1018, 49 South. 692.

The rule of incapacity to contract, which the law of this state imposed upon married women, found its exceptions in those provisions, whereby they were permitted to enter into contracts when authorized by their husbands, and later by the judges of their domiciles, after being examined, and in perhaps a few other cases, specially provided for. By Act No. 94 of 1916 the General Assembly has so changed the law that it may now be said that the capacity of a married woman to contract is the rule, the incapacity, the exception. The act of 1916 has, however, no application to this case, which originated prior to its passage. The suggestion that we note in the opinion first handed down by the Court of Appeal, that, if a married woman may sell her property and give the proceeds to her husband, or make any other disposition of it,

she should, by the same token, be permitted to mortgage her property and give her husband the proceeds of the mortgage, makes a certain appeal as abstract reasoning, but we are here dealing with a question that has been reasoned out by the lawmakers to a conclusion over which the courts have no control.

They (the lawmakers) have said, during a century or more, that a married woman should have no capacity to bind herself or her property for her husband's benefit, or for the payment of his debts. They have not said that she should have no capacity to sell her property, nor has she been altogether prohibited from giving it, or its proceeds, to her husband, though the proportion that she has been allowed to give has been limited to what may be given to a stranger and the donation has been always revocable. Whether the act of 1916 makes any change in that respect remains to be seen.

The fact that the note sued on was the last of a series, the first of which was given to the Ouachita Bank, does not affect the main question here presented; the debt, in its origin, was one for which the defendant had no capacity to bind herself, and it was neither novated nor was its character changed by the renewal of the notes.

The case has been correctly decided, and it is therefore ordered and decreed that the demands of the applicant be rejected, and this application dismissed at its cost.

O'NIELL, J., dissents.

(78 South. 137,

No. 22778.

JACKSON et al. v. TEXAS CO.

(Feb. 25, 1918.)

(Syllabus by the Court.)

1. GAS  $\Rightarrow$  16, 18—PIPE LINES—CARE REQUIRED—PERSONAL INJURY—LIABILITY.

There rests upon the owner of a pipe line, conveying so dangerous a fluid as natural gas

through what has the appearance of, and is commonly used as, a public highway, in an inhabited place, the obligation to exercise vigilance commensurate with the danger and of a character to protect the public, in person and property, from injury and destruction; and, where it appears that a leak in the pipe had existed for at least five months, that the escaping gas could be heard, and often was heard, by passers on the highway, and, when lighted, as it often was lighted, could be seen, and was seen, at night throughout the neighborhood, and where it further appears that the owner did not learn of the leak until after an accident whereby a child was injured, that the inspection of the line was perfunctory and inefficient and was not likely to have furnished that information until after some injury had been inflicted or property destroyed, it must be held that such owner was guilty of negligence in failing to make an earlier discovery of the leak, and became liable for the consequences, to the same extent as though the discovery had been so made and the leak had nevertheless been allowed to continue.

2. GAS  $\Rightarrow$  18—NEGLIGENCE—CHILDREN—DANGEROUS PREMISES.

The doctrine that it is not the duty of the occupier of land to make it safe for infant children who come upon it without invitation, and merely by sufferance, has no application to a case where the occupier has taken no steps to inform the public of his occupancy, but, having established something which is at once attractive and dangerous to young children upon land which has all the appearance of a public highway, and is so used by the public, including the children, has failed either to give notice that the place is not open to the public, or to take the proper precautions to protect the public, including the children, against the danger which he has there created, and from exposure to which a child has been injured.

3. GAS  $\Rightarrow$  18—NATURAL GAS PIPE LINE—INJURY TO CHILD—LIABILITY—PROXIMATE CAUSE.

Where a company handling natural gas negligently allows a leak to exist in its pipe line upon land which has the appearance of, and is commonly used as, a public highway, in a settled neighborhood, and young children, including a boy and girl, aged, each, about six years, attracted by the escaping gas, play with it in various ways, until, the boy lighting it at the request of the girl, the girl is badly burned, the boy, by thus intervening, can no more shift the blame for the accident from the company to himself than can the injured girl, and neither of them being legally responsible or capable of appreciating the probable consequence of yielding to the temptation held out to them through the negligence of the company, that negligence must be regarded as the proximate cause of the accident, and the company is liable in damages for its consequences.

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Suit by J. S. Jackson and Emma Jackson, for the use and benefit of their minor child, Burdette Jackson, against the Texas Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hampden Story, of Shreveport, for appellant. W. B. Massey, of Shreveport, for appellees.

#### Statement of the Case.

MONROE, C. J. Defendant has appealed from a verdict and judgment for \$5,000, recovered by plaintiffs, suing on behalf of their minor child, a girl aged about six years, on account of personal injuries sustained by her through defendant's alleged negligence.

It appears from the evidence that plaintiffs, with their children, lived on Mansfield road, in the suburbs (as we take it) of Shreveport, and that along the side of their house was a path extending from that road to the Texas Pacific Railway, which path was open to, and used by the public, and beyond which, from 6 to 10 feet, and some 25 feet from plaintiffs' house, also upon or in ground that was open to the public, was a gas pipe line whereby defendant conveyed natural gas, for its own purposes, from one place to another. It is not altogether clear whether the path itself was on private ground or ground that was set apart for a street, but the evidence shows that the piping in question was laid to a depth of about 10 inches below the surface of privately owned land, through which defendant, or its authors in title, had acquired a right of way, and it is possible that the land over which the path ran was also of that character. However that may be, the pipe sprang a leak; the children in the neighborhood made the discovery; and as the point at which the leak occurred was as much open to the public as the path, and quite near the path, it became a place of resort for them,

and the lighting of the gas and the using of the fire thus created for the roasting of peanuts and other purposes became one of their recreations. The plaintiff J. S. Jackson was an engineer whose employment kept him away from home a great deal, and he testifies that upon one occasion when he was at home, realizing that the gas was dangerous, he filled the hole that appeared in the ground above the leak and set up an inch pipe, about 7 feet long, in such a fashion as to catch the leakage and carry it above the heads of the children, and warned them not to fool with the pipe, but it seems that after they had amused themselves for perhaps a few days by lighting the gas as it escaped from the top of the pipe, they reverted to their own methods, and upon a day in October, 1916, one of them, a little past six years old, at the instance of the little girl about the same age, lighted the gas near the ground, and there being some loose paper lying about, the paper caught fire, and set fire to the clothing of the little girl, burning her very severely and inflicting injuries which seem likely to prove permanent, and to threaten still others. Mrs. Jackson, the mother of the little girl, testifies that she had forbidden her to ignite the gas, but she had other small children and other cares and was unable to see that her prohibition was observed, and the gas was ignited during a good part of the time within the several months which preceded the accident. Mrs. Jackson also made an attempt to have the leak stopped by speaking about it to a representative of the Southwestern Electric Company, which company she assumed was the owner of the pipe, but as that company was not the owner and felt no interest in the matter, nothing was done. In addition to being made known by being made visible, the gas at other times attracted attention by making itself heard; that is to say, a funnel shaped hole which had been formed, or perhaps scratched by the children, in the ground just

above the leak, would get filled with rain water and the gas, bubbling up through it, could readily be heard at a considerable distance, and attracted the attention of a number of persons, who testified to that effect; one of the witnesses having observed it as far back as the month of May—some five months before the accident—and the burning gas was seen at night from the gallery of a house 400 feet distant. About the only person who might have been expected to know of the existence of the leak, but who remained ignorant of it, until after the accident, was defendant's "line walker," who was employed to do no other work than walk the lines and see that they were in order. He testifies that he "walked the line" in question on August 6th, September 14th, and October 1st, and had walked it prior to that time; that he would usually make one trip a week, which does not seem to fit in with his testimony as to the intervals between the dates of his walks previously given. He also testifies that his average gait was  $3\frac{1}{2}$  to 4 miles an hour, which, though slow for fighting aeroplanes, is a fair pace for an inspector. On the other hand, there are several witnesses who did not seem to understand how it would be reasonably possible for a person to walk along the path and not become acquainted with the fact of the leak. Defendant's superintendent of its pipe line department testified that he and another man walked over the line about the middle of September, 1916, and passed the point where the leak existed, but observed no escape of gas; that the pipe was buried at that point from 8 to 12 inches; that he saw no burnt spot, or any indication that the pipe had been tampered with; that the dirt over the pipe was compact and settled, and, if there had been a hole there, he would have seen it. But on his cross-examination he gave the following testimony:

"Q. At the time you passed over this pipe line, were you looking for leaks in it? A. No, sir; general inspection. Q. You just walked along

there, like anybody else? A. Yes, sir; if there was a leak there, I would have noticed it though."

And on his re-examination in chief he testified as follows:

"Q. What was your purpose in walking that pipe line at that time? A. As a general inspection of lines. Q. What is the purpose of inspection; is that to look for leaks? A. No, reason particular. Q. Well, what was the idea in walking it—just to take a promenade? A. Well, general inspection; just to see whether there is anything to be seen that you might want to see. If there was a leak there, I would have noticed it."

That there was a leak there, that it had been there for at least five months prior to October 6, 1916, and that it attracted the attention of persons who were not inspecting the line and had no interest in finding it, is abundantly shown by the testimony of eight or ten witnesses, from which, and from the testimony of defendant's inspectors, we conclude that the inspections made by them were perfunctory and inefficient and not such as the occasion required.

The little girl was burned upon the back part of her person and legs, in some places very deeply, and, after being treated for two months at a sanatorium, was left with a slight limp and several areas of scar tissue which hold out no very encouraging prospect for the future. The surgeon who attended her testifies that, as matters now stand, the injuries are permanent, but that, by removing the scar tissue and grafting live skin in its place, a complete recovery may be effected. Another surgeon, called by plaintiff for the purposes of the case, was of a different opinion. He did not think grafting would effect a complete cure, or that an operation is advisable at this time, or unless the scars grow larger, and he expressed the opinion that in the future they will probably develop malignant trouble.

#### Opinion.

[1] Using the methods of inspection to which defendant's witnesses have testified, it

does not appear to us that its inspectors would have been likely to discover a leak in its pipes, save by some such consequence as injury to persons or destruction of property, and, as the obligation rested upon defendant in conveying so dangerous a fluid as natural gas through a place which had all the appearance of a public highway, and was commonly so used, to exercise vigilance commensurate with the danger, and of a character to protect the public, in person and property, from injury and destruction, its failure to exercise such vigilance was negligence, for the consequences of which it should be held liable to the same extent as though it had discovered the leak and had failed to stop it. *Wolff v. Shreveport Gas, E. L. & P. Co.*, 138 La. 743, 70 South. 789, L. R. A. 1916D, 1138; *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; *Pine Bluff Water & Light Co. v. Schnelder*, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366.

[2, 3] The counsel for defendant cites authority to the effect that it is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation, and merely by sufferance, which is sound enough doctrine when properly applied, but it has no application to a case where the occupier has taken no steps to inform the public of his occupancy, but, having established something which is at once attractive and dangerous to young children upon land which has all the appearance of a public highway and is so used by the public, including the children, falls either to give notice that the place is not open to the public, or to take the proper precautions to protect the public, and the children, against the danger which he has there created.

The learned counsel also cites authority to the effect that, although one may negligently create a condition of potential danger from which injury to another results, yet if such

injury is immediately produced by the act of a third person intervening, the act, and not the negligent creation of the condition, by reason whereof alone it becomes effective, is the proximate cause of the injury; and that doctrine, no doubt, finds proper application in some cases; but this is not one of them, since the "intervener" here, being about the same age as the child that was injured, was no more capable of shifting the blame for the accident from the defendant to himself than was the injured child. He ignited the gas because the little girl told him to do so, but, as neither of them was old enough to appreciate the consequence of the act so directed and performed, the responsibility for that consequence rests upon the defendant, as the creator of the condition which suggested the act to the immature minds of the children, and at the same time made its performance a source of danger to them. In *United States Natural Gas Co. v. Hicks*, 134 Ky. 12, 119 S. W. 166, 23 L. R. A. (N. S.) 249, 135 Am. St. Rep. 407, it was held (quoting the syllabus):

"(1) The negligence of a gas company in maintaining in a public highway a leaky gate valve in its main, inclosed by a cracked and decayed box, and not the act of a four year old boy, in throwing a match through the crack into the box, is the cause of an explosion of the gas to the injury of a person in the highway.

"(2) The question of the contributory negligence of an eight year old child, in playing near a leaky gate valve in a gas main, cannot be decided by the court as matter of law, although he had been warned by his parents to keep away from it."

Upon the question whether the condition brought about by what we have held to have been the negligence of the defendant constituted an attraction which was likely to lead young children into trouble, we entertain no doubt. There was the gas at large in their very playground, unsecured, unguarded, unattended, and ever ready to be converted, by a lighted match, into the fire of a blacksmith's forge, of a baker oven, of a laundry furnace, or peanut roaster, or into an illu-



mination which could be seen at night from all the residences round about. Nothing more attractive to a child could have been devised; nor have we any doubt that to the situation so created, and its consequences, there should be applied the following principle of law, as expressed in the syllabus of an opinion heretofore handed down by this court, to wit:

"Where a defendant negligently leaves exposed in a public place, unsecured, unguarded, and unattended, a dangerous machine likely to attract children, excite their curiosity, and lead to their injury, while they are pursuing their childish instincts, a child of tender years injured by said machine, while meddling with it, is entitled to recover damages for the injury inflicted." *Westerfield et al. v. Levis Bros. et al.*, 43 La. Ann. 64, 9 South. 52.

And the principle is none the less applicable that, in the case cited, the attractive and dangerous thing left exposed was a machine, and not an invisible and inodorous, but highly combustible and inflammable, gas, or that it was left in what was really a public highway, and not in a place which was commonly believed to be, and used as, had the appearance of, and bore no signs to indicate that it was not, a public highway.

Plaintiffs' counsel ask that the amount awarded by the jury be increased. Defendant's counsel think it should, in any event, be reduced. Defendant, upon the advice of its counsel, acted most humanely and liberally with the plaintiffs in the beginning. Being informed of the accident, and that plaintiffs were unable to make proper provision for the child, it directed that she be placed in the sanitarium at Shreveport, provided with day and night nurses, with such surgical attention as the case required, and so long as it was required, and the child was withdrawn from the sanitarium, and, as it appears to us, from the treatment so provided, at the instance of the plaintiffs (or of her mother), and not of the defendant. The amount paid by defendant exceeded \$500, and it was willing to pay more. Under the

circumstances, whilst we do not feel that the amount allowed by the jury should be reduced, we find no sufficient reason for increasing it.

The verdict and judgment appealed from are therefore affirmed.

(78 South. 140)

No. 22783.

SWAIN v. KIRKPATRICK LUMBER CO.  
et al.

(Feb. 25, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT  $\S$ 82(2)—LIEN FOR WAGES—"INDEPENDENT CONTRACTOR."

A foreman and filer in a sawmill has a lien or privilege on the material manufactured in the mill when he is employed under Act No. 23 of 1912, p. 30, although his wages are measured by the amount of material produced, less the amount paid by the employer to the workmen who are under the joint control of the employer and foreman. He is not an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

2. FRAUDULENT CONVEYANCES  $\S$ 237(1) — REVOCATORY ACTION.

The revocatory action lies when the sale complained of was made by judicial process, or by convention of the parties.

3. JUDICIAL SALES  $\S$ 37—VALIDITY—FRAUD—PREVENTION OF COMPETITION.

Fraud in the concealment or misrepresentation of facts is not the only cause which will vitiate a judicial sale. Anything by a party in interest that chills the sale, or prevents competition among the bidders, will, on competent proof, cause such sale to be set aside.

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by C. H. Swain against the Kirkpatrick Lumber Company, the Calcasieu National Bank of Southwest Louisiana, and the Calcasieu Mercantile Company. Judgment for plaintiff by default, and the bank and the mercantile company appeal. Affirmed.

Pujo & Williamson, of Lake Charles, for appellants. Peterman & Dear and Hundley

& Hawthorn, all of Alexandria, and Cline & Bell, of Lake Charles, for appellee.

SOMMERVILLE, J. Plaintiff, the foreman and filer in the mill of the Kirkpatrick Lumber Company, is a judgment creditor of that company, with recognition of a lien for wages on the lumber manufactured by said company while he was in its employment, and which was stacked on the yards of said company in Calcasieu parish. He caused the lumber to be provisionally seized; all in accordance which Act 23 of 1912, p. 30.

He alleges that while under seizure the other two defendants, the Calcasieu National Bank of Southwest Louisiana and the Calcasieu Mercantile Company, caused executory process to issue under a chattel mortgage given to them by the Kirkpatrick Lumber Company, under Act 65 of 1912, p. 75, and caused the same 350,000 feet of lumber provisionally seized by him to be seized and sold under the chattel mortgage above referred to, and that the bank became the purchaser thereof for the vile price of \$200, and that it has sold the same for the joint benefit and account of the Kirkpatrick Lumber Company, the mercantile company, and itself, and that he has thus been unfairly and fraudulently deprived of his wages and lien therefor.

Plaintiff further alleges and shows that the lumber sold was well worth \$6 to \$8 per thousand feet. He further alleges that the three defendants conspired and colluded together to prevent, prohibit, suppress, and stifle competitive bidding at the sale of the lumber; that they circulated and caused to be circulated, directly and by inference, various and sundry reports tending to keep off and prevent bidders who were present at the sale from bidding; that no one bid at the sale except the agent and representative of the bank and the mercantile company; and that defendants were thus given an unfair and undue preference, to his injury.

Plaintiff alleges that the lumber company was insolvent on the day of the sale, and he has proved that it was insolvent, to the knowledge of the other defendants, at the date of the chattel mortgage given to them. He further alleged and proved that a large part of the lumber seized and sold under executory process was not covered by the chattel mortgage, to the knowledge of the defendants, and that the funds derived from the sale of the lumber mortgaged and that not mortgaged were commingled and confused.

Plaintiff asked that the sale be annulled and set aside, and, as the property had been disposed of by defendants, that he have judgment in his favor against defendants in solido for the value of the lumber to the extent of his claim.

The lumber company did not answer, and default was taken against it. There was judgment in favor of plaintiff and against the defendants. The bank and the mercantile company have appealed. The lumber company has not appealed.

[1] In their answer, the bank and the mercantile company deny that plaintiff had a lien on the lumber seized and sold. They argue that he was an independent contractor, and not covered by the terms of Act 23 of 1912, p. 30. They also set up the validity of the sale.

The evidence is clear that plaintiff was the foreman and saw filer in the sawmill, and that he received, or was to receive, \$3.50 per thousand feet on the lumber manufactured in the mill; that he was to employ the hands engaged in the mill, who were subject to the orders of himself and his employer; that the hands were to be paid by the sawmill company; and that he (plaintiff) was to receive from his employer the difference between the wages thus paid to the other hands and the amount due him at \$3.50 per thousand feet of lumber manufactured.

The court has held adversely to the position assumed by the defendants in somewhat similar cases. The sawmill company owned and operated the mill, and plaintiff was hired by it to serve as foreman therein, at the will of the company. The president of the company was present every day, and directed plaintiff and the other workmen. Plaintiff was under the authority of the company, and the other workmen were under the joint authority of plaintiff and the company. It is immaterial what plaintiff's wages were to have been, or how they were to have been paid. Wages are that which are paid for a service rendered; what are paid for labor; hire. *Century*.

In the case of *Lalanne v. McKinney*, 28 La. Ann. 642, where laborers were to receive one-half of the proceeds of the cotton and other produce, the court said:

"The testimony of the laborers shows that the contract between them and McKinney was that they were hirelings, to be paid by the half of the proceeds of the cotton and by receiving the half of the other produce. This contract was exactly like the one between the Cowans and their laborers, reported in 22 La. Ann. p. 438, where it is said: 'The plantation in question was owned by the defendants in 1867 and cultivated by them in cotton. The defendants employed certain laborers, and agreed to give them, in lieu of wages, one-third of the gross products of the cotton. There was plainly no partnership in this. The plantation was the Cowans', the cotton as it grew was theirs, the supplies were furnished to them for the crop; and every fiber of the cotton as it matured was affected by the privilege.'"

Again, in the case of *Faren v. Sellers*, 39 La. Ann. 1017, 3 South. 366, 4 Am. St. Rep. 256, the court quotes from Mr. Wood, 614, as follows:

"The simple test is, Who has the general control over the work? Who has the right to direct what shall be done and how to do it? And if the person employed reserves this power to himself, his relation to his employer is independent and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant."

In other jurisdictions, findings are to the same effect. See *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, 48 C. C. A. 632:

"Defendant, which owned and operated a sawmill, contracted with a third person to work up the slabs into laths and pickets, using machines in the mill which were run, kept in order, and lighted by defendant. Defendant owned the products, paid the wages of the workmen employed by such person, and paid him the remainder, if any, due, computed at a stipulated price per one thousand for the laths and pickets made. Held, that such person was not an independent contractor, but a servant of defendant, put in charge of particular machines, and paid upon the terms stated, and that whatever duty there was to instruct an inexperienced workman employed in the operation of such machines as to the dangers of the employment remained a duty of defendant."

And *Barclay v. Puget Lumber Co.*, 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140, 3 Am. Dig. (1908A) p. 1806:

"Where defendant operated a lath mill through a contract with T. by which T. was to receive 75 cents per one thousand laths produced, and was to employ other men, whom defendant was to pay out of the 75 cents per one thousand, T. to receive the balance, \* \* \* and plaintiff was employed by T. to work in the mill, T. was not an independent contractor, \* \* \* and the relation of master and servant existed between plaintiff and defendant."

See, also, *Moffet v. Koch*, 106 La. 375, 31 South. 40; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 638; *Employers' Indemnity Co. v. Kelly Coal Co.*, 149 Ky. 712, 149 S. W. 992, 41 L. R. A. (N. S.) 963; *Yeates v. I. C. R. R. Co.*, 241 Ill. 205, 89 N. E. 338, 7 Am. Dig. 1722.

And in *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 803, 13 Dec. Dig. 27, it was held:

"Defendant was engaged in the business of manufacturing iron and steel and owned and furnished the building, machinery, material, and motive power, and provided the superintendent and head workman in a rolling mill in which plaintiff worked. The department in which plaintiff worked was under the control of a 'boss roller,' who furnished his own assistants and employed all help under him (among whom was plaintiff), kept the time of these assistants, had the right to discharge them, had sole control of manufacturing into iron and steel material furnished him by the defendant, and was paid a certain gross sum for his work, from which he paid his assistants. Defendant company repaired and improved all

machinery, exercised some control over material while it was in the boss roller's hands, and also had the right to discharge men employed by said boss roller. Held, that the boss roller was a foreman, rather than an independent contractor, since such contractor is not the servant of his employer, and that from the fact that defendant had the right to discharge plaintiff could be implied the contractual relation of master and servant."

And in *Andrews Bros. v. Burns*, 22 Ohio Cir. Ct. R. 437, 13 Dec. Dig. 27, it was held:

"Where a rolling mill company employs a boss roller under the rules \* \* \* of the \* \* \* association, the boss roller to employ his own assistant roller, roughers, and heaters; the compensation to be an agreed price per ton for labor performed divided among the boss roller and his assistants, \* \* \* as provided by the rules, \* \* \* and the output of the mill to be under the direction of the superintendent and to his satisfaction, the relation of the company and the employé is that of master and servant."

Plaintiff has not offered direct evidence showing collusion and fraud between the three defendants by which he was deprived of the lumber upon which his lien rested; but the conclusion is clear that the acts of defendants, taken separately and together, deterred bidding at the sheriff's sale, except by one bidder. That bidder was declared in an answer to one of the suits between plaintiff and defendants not to represent them (defendants) at the sale; the bank and the company admit him to have been their representative at the sale in their answer to this suit.

The evidence shows that the bank and the mercantile company knew that the sawmill company was insolvent at the time that they took the mortgage notes foreclosed upon in the executory proceeding; they knew that some, if not about one-half, of the property upon which their chattel mortgage rested had been sold and removed by the lumber company before the seizure was made by them; they caused to be seized and sold lumber upon which they knew their mortgage did not rest; they knew that the president of the sawmill company permitted them

to seize and sell lumber upon which their chattel mortgage did not rest, if he did not actually agree to the seizure; they knew before they sought execution on their mortgage notes that plaintiff had sued the sawmill company for his wages as foreman and filer, and had asked to have a lien or privilege on the lumber recognized therefor; they sent a representative to the sale who pretended to be acting for himself; this agent saw several prospective bidders on the day of the sale, and told one of them "whoever bought the lumber would have a lawsuit with the bank," and that person decided he would have to litigate with the bank if he bought, and he did not bid, although he had gone there for the purpose of bidding. Other bidders present refused to bid because the president of the sawmill company told them that the lumber was on leased ground and subject to a landlord's lien, when the yearly rent was only \$5, and that had been paid in advance; he also said that the buying of the lumber would not give a right of way for hauling it, and that the railroad spur which was laid to the sawmill was a private spur which belonged to his company, and that it could not be used unless he gave permission to use it. Defendants knew that their bid of \$200 was an inadequate price for the lumber, being less than one-tenth of its value. The bank and mercantile company bought the lumber for the joint account of themselves and the sawmill company, and did not credit the account of the latter with the \$200; but they, with the assistance of the president of the sawmill company, subsequently sold and delivered the lumber to others for more than \$2,000, and divided the receipts between the bank and the mercantile company, and credited the notes of the sawmill company with the full amount realized from the sale.

Thus the three defendants acted in the interest of one another through all the stages of the transaction referred to, and through-

out the litigation, and, at the close, divided the spoils between them.

[2,3] The suit of plaintiff is similar to the revocatory action. Plaintiff is a judgment creditor of the sawmill company, which concern was in insolvent circumstances when the mortgage notes were issued to defendants and when the sale and purchase thereunder took place. These transactions were made in bad faith, and they injured plaintiff. They are deemed under the law to have been made in fraud of the creditors of the sawmill company. It is immaterial that the sale of the lumber was by a judicial proceeding rather than by convention between the parties. On this point, it is said in *Newman v. Baer*, 50 La. Ann. 329, 23 South. 279:

"An insolvent debtor cannot give in payment to one creditor to the prejudice of the others any other thing than the sum of money due. Rev. Civ. Code, art. 2658; *Taylor v. Knox*, 2 La. 10; *Lovell v. Payne*, 30 La. Ann. 511. The acts and doings of an insolvent debtor through which he seeks to give a fraudulent preference to one creditor over others are all the more to be reprobated when the machinery of the law is invoked to give the semblance of plausibility and propriety to such proceedings. *Haas v. Haas*, 35 La. Ann. 885. The law recognizes no distinction between a voluntary conveyance of property in fraud of creditors and such an alienation disguised under the forms of judicial proceedings. It will annul and set aside any machination or contrivance by which this is sought to be done. Rev. Civ. Code, arts. 1969, 1970, 1983, 2658; *Muse v. Yarborough*, 11 La. 530. Neither the law nor the courts are to be used as instruments to work injustice. To attempt this is to aggravate the offending."

The state of facts in this case is one which admits most clearly of the application of the revocatory action. Not only contracts which dispose of property, says the Civil Code, article 1984, but all others which are made in fraud of creditors, and deprive them of their recourse upon the property of their debtor, come within the provisions of the section of the Code which treats of this action. In the case of *Prats v. His Creditors*, 5 Rob. (La.) 288, the court held:

"A fraud perpetrated by the machinery of a judgment, when the courts themselves are made

the unconscious instruments, is as liable to be questioned and annulled as when affected by the legal forms of a contract."

And in *Stone v. Kidder*, 6 La. Ann. 552, the court said:

"Every fraudulent device, contrivance, or artifice by which a creditor may have been injured, and from which a fraud upon his rights is practiced, is reached and remedied by this action."

See, also, to the same effect, *Block v. Marks*, 47 La. Ann. 108, 16 South. 649.

The judgment of the trial court in setting aside the sheriff's sale was also fully justified because of the acts of defendant's agent in deterring another from bidding, regardless of what his motive was, honest or fraudulent. His acts caused great prejudice to this plaintiff by preventing others from giving a greater price for the lumber.

The law is stated in 2 R. C. L. 1131, to be:

"Sales at auction must be fairly and openly conducted. The great object of the rules regulating such sales and said to be founded upon reasons of public policy is to secure a fair price to the owner or those interested in the proceeds of the property. This can only be accomplished by the means of fair competition. Just as the law protects the purchaser by condemning the practice of employing puffers to enhance the price, in like manner it protects the owner of the property and such persons as may be interested in the proceeds thereof by forbidding the stifling of competition among bidders, irrespective of the cloak under which it is accomplished, in order that those interested in the property may obtain a full equivalent therefor. A sale may be set aside where a mortgagor whose property is being sold at foreclosure sale appeals to the sympathy of the crowd in order to induce them not to bid against him even though his representations are perfectly true. Moreover, it is entirely immaterial whether the statements were made publicly at the sale or privately, so long as they had a depressing effect upon the sale. The rule is equally applicable to any act of the auctioneer of the owner of the property selling, or of third parties as purchasers, which prevents a fair, free and open sale, or which diminishes the competition and stifles or chills the sale."

See, also, *Liles v. Rhodes*, 7 La. 91; *Wood v. Hennen*, 9 La. Ann. 264; *Chaffe v. Farmer*, 34 La. Ann. 1017; *Chaffe v. Meyer*, 34 La. Ann. 1031; *Barclay v. Puget*, etc., Lbr.

Co., 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140.

Act 23 of 1912, p. 30, in the first section gives to "all managers, mechanics or laborers employed by or working in sawmills," etc., liens or privileges on all logs, lumber, etc., manufactured in the mills where such managers, mechanics, or laborers are engaged or employed, for the payment of their salaries or wages.

Plaintiff was engaged and employed in defendant's sawmill as foreman and filer, and he had a lien upon the lumber seized and sold by the other defendants, the bank and the mercantile company, and he was in a position to contest, and he has successfully contested, the validity of the sale of that lumber under the executory process sued out by two of the defendants. *Meyer v. Farmer*, 36 La. Ann. 785.

The judgment appealed from is affirmed.

(78 South. 143)

No. 22832.

STATE ex rel. BRITTAİN, Sheriff, v. HAYES.

(Feb. 25, 1918.)

(Syllabus by the Court.)

1. COURTS  $\S$ 224(7) — LOUISIANA SUPREME COURT — APPELLATE JURISDICTION — LEGALITY OF TAX.

When the nature and character of a particular business sought to be taxed is proven or admitted, and the only question presented is whether the business is subject to a license tax, the case is one in which the legality of a tax is in contest, and of which the Supreme Court alone has appellate jurisdiction, regardless of the amount involved.

2. HAWKERS AND PEDDLERS  $\S$ 3(2) — DAIRYMAN DELIVERING MILK TO CUSTOMERS — "PEDDLING OR HAWKING."

The occupation of a dairyman, going about delivering the milk from his farm to his regular customers according to their previous orders, is not, within the ordinary meaning or acceptation of the term, peddling or hawking.

3. STATUTES  $\S$ 166 — AMENDMENT AND RE-ENACTMENT — REPEAL.

When a statute has been amended and re-enacted, any part of the amended act that is

omitted from the amending and re-enacting statute is thereby repealed.

4. HAWKERS AND PEDDLERS  $\S$ 4(3) — LICENSE TAX — "AGRICULTURAL PURSUITS" — CONSTITUTIONAL PROVISIONS.

A farmer who goes from place to place selling at retail the products of his farm is only pursuing the business or occupation of a farmer, and is not subject to the license tax imposed upon "peddlers or hawkers." He comes within the provision of the Constitution exempting from any license tax all persons engaged in agricultural pursuits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agricultural Pursuits.]

5. HAWKERS AND PEDDLERS  $\S$ 4(1) — LICENSE TAX — CONSTRUCTION OF STATUTE.

By the terms of the Act No. 229 of 1912, p. 517, the peddlers or hawkers of farm products who are required to pay a license tax are, not those whose industry has produced them, but those who buy and sell or trade in them.

(Additional Syllabus by Editorial Staff.)

6. HAWKERS AND PEDDLERS  $\S$ 3(1) — WHO ARE.

A peddler or hawker is an itinerant merchant or trader who goes from house to house or from place to place, exposing and selling the goods, wares, or merchandise he carries.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hawker; Peddler.]

Appeal from First Justice's Court, Parish of Red River; A. F. Massingall, Justice.

Proceeding by the State of Louisiana, on relation of T. M. Brittain, Sheriff and ex officio Tax Collector, against Roy Hayes. Judgment for defendant, and relator appeals. Motion to dismiss appeal overruled, and judgment affirmed.

William Paul Carter, of Coushatta, for appellant. S. R. Thomas, of Coushatta, for appellee.

On Rehearing.

O'NIELL, J. The question presented is whether the defendant owes the state the license tax of \$75, imposed by the Act No. 229 of 1912 upon every peddler or hawker traveling in a one-horse vehicle.

The defendant is a farmer who drives to town daily in his buggy and delivers to his

regular customers, according to their orders, milk produced by his cows on the farm.

The defenses are: First, that the defendant is not a peddler or hawker because he does not go about selling the milk, but only delivers to his customers the milk that is already sold or ordered from the farm; second, that the sale and delivery of the milk produced on his farm is done in pursuit of the defendant's agricultural or farming business, which pursuit is exempt, by the terms of article 229 of the Constitution, from any license tax; and, third, that, by the terms of the Act No. 229 of 1912, a person is not required to pay a peddler's license for selling the product of his own industry.

Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

[1] On the first hearing, we sustained the appellee's motion to dismiss the appeal on the ground that the case presented only the question of fact whether the defendant was a peddler. Having reconsidered the matter, our conclusion is that the case presents, not a question of fact, but questions of law, by which we are to determine whether the license tax can be legally imposed upon the defendant. This court alone has appellate jurisdiction of cases in which the constitutionality or legality of any tax is in contest. Const. art. 85. The motion to dismiss the appeal is therefore overruled.

[2, 3, 6] Our opinion is that the defenses to the suit are well founded. It is certain that the occupation of a dairyman, delivering milk to his regular customers in compliance with their previous orders, is not, within the ordinary meaning of the term, peddling or hawking. A peddler or hawker is an itinerant merchant or trader, who goes from house to house or from place to place, exposing and selling the goods, wares or merchandise he carries.

[4, 5] It is argued by the attorney for the tax collector that, as the Act No. 49 of 1904

(of which the Act No. 229 of 1912 is an amendment and re-enactment) contains the provision that the term "peddler or hawker" shall include all transient merchants or itinerant vendors selling to consumers, even by sample and for future delivery, therefore the term must include those who deliver goods or merchandise already sold. The argument, however, ignores the fact that the law, as amended and re-enacted does not now declare that itinerant vendors who sell by sample or for future delivery are peddlers or hawkers. To that extent the Act No. 49 of 1904 was declared unconstitutional. See *Beary v. Narrau*, 113 La. 1034, 37 South. 961. The statutory definition or extension of the term "peddler or hawker" was omitted from the Act No. 295 of 1908, amending and re-enacting the Act No. 49 of 1904, and was also omitted from the subsequent amending and re-enacting statutes, viz. Act No. 294 of 1910, and Act No. 229 of 1912. The Act No. 49 of 1904, therefore, was re-enacted and retained in force only as amended; and the part of the amended act that was omitted from the amending act must be considered repealed. See *Flournoy, Tax Collector, v. Walker*, 126 La. 489, 52 South. 673.

It has been decided by this court that a farmer who goes from place to place selling at retail the products of his farm is only pursuing his farming business and is not a peddler or hawker. He is engaged in an agricultural pursuit, which is, by the terms of article 229 of the Constitution, exempt from any license tax. *Roy v. Schuff*, 51 La. Ann. 86, 24 South. 788.

There is a proviso in the Act No. 229 of 1912, p. 517, that exempts from the license tax imposed upon peddlers or hawkers those who sell only the products of their industry. After providing that peddlers of poultry, eggs, vegetables or fruit shall pay only one-fifth of the license tax imposed upon other peddlers or hawkers, the statute declares

that persons who sell only "their own produce shall pay nothing." Hence the peddlers of farm products who are required to pay a license tax are, not those whose industry has produced them, but those who buy and sell or trade in them.

The judgment appealed from is affirmed.

(78 South. 138.)

No. 21079.

**SANDERS v. HUMPHRIES et al.**

(Feb. 25, 1918.)

*(Syllabus by the Court.)*

**1. SHERIFFS AND CONSTABLES §=100, 158—ACTS OF DEPUTY—LIABILITY.**

A sheriff is not liable, nor is the surety on his official bond liable, in damages for personal injuries to a citizen, inflicted recklessly by a deputy sheriff, unless it was done in violation of an official duty or in an unfaithful or improper performance of an official act.

**2. SHERIFFS AND CONSTABLES §=168(1)—PERSONAL INJURY BY DEPUTY—SUFFICIENCY OF PETITION.**

The allegation that a deputy sheriff, while on duty as such and while acting as deputy, agent, servant, and employé of the sheriff, maliciously and recklessly shot and wounded the plaintiff, does not specifically charge that the wrongful act of the deputy sheriff was done in violation of an official duty or in an unfaithful or improper performance of an official act. Such an allegation, without any specification or averment of fact from which the court or jury might judge whether the wrongful act of the deputy sheriff was a violation or improper performance of an official duty, does not disclose a cause of action against the sheriff or the surety on his official bond for damages for personal injuries.

Monroe, C. J., dissenting.

Appeal from Thirteenth Judicial District Court, Parish of Caldwell; George Wear, Sr., Judge.

Action by Alfred H. Sanders against John Humphries and others. Suit dismissed as to the said defendants on exception of no cause of action, and plaintiff appeals. Affirmed.

George Wear, Jr., of Jena, for appellant. C. P. Thornhill, of Columbia, for appellee W. E. Godfrey. Hudson, Potts, Bernstein &

Sholars, of Monroe, for appellee American Surety Co.

O'NIELL, J. This is an action for damages for personal injuries alleged to have been inflicted upon the plaintiff by a deputy sheriff. The other defendants are the sheriff and the surety on his official bond. The suit was dismissed as far as they were concerned, on exceptions of no cause of action. The plaintiff prosecutes this appeal.

The only question to be decided, therefore, is whether the allegations of the petition disclose a cause of action against the sheriff and the surety on his official bond, or against either of them. The allegations on which is founded the action against the sheriff and his surety are the following, viz:

(1) That John Humphries, while on duty as a deputy sheriff of the parish of Caldwell, and while acting as deputy, agent, servant and employé of the sheriff, maliciously and recklessly assaulted, shot, and wounded petitioner with a pistol, without cause or provocation.

(2) That, inasmuch as W. E. Godfrey was the sheriff and the employer of John Humphries at the time of the assault upon petitioner, he is liable in solido for the damage done by John Humphries.

(3) That, under the terms and conditions of the sheriff's official bond (attached to the petition and made part of it), the American Surety Company of New York is liable in solido with the sheriff and his deputy for the damage inflicted upon petitioner by John Humphries while acting as deputy, agent, servant, and employé of the sheriff.

The conditions of the official bond required of a sheriff are fixed by Act No. 52 of 1880, p. 50, and the obligations of the bond attached to the plaintiff's petition are not greater than the statute requires, viz.:

That the sheriff "shall well and faithfully execute and make true returns, according to law, of all such writs, orders and process as shall come



into his hands as sheriff aforesaid to the person entitled by law to the same, and shall faithfully do and perform all such other duties as may be required of him by law."

[1, 2] The liability of the surety in this case, therefore, depends upon whether the plaintiff has alleged sufficient facts to show that the deputy sheriff violated, or failed to perform faithfully, a duty required of him by law. The surety is liable as well for a deputy sheriff's violation of an official duty, or for his failure to perform such duty faithfully, as for the sheriff's violation, or failure of faithful performances of official duty. But neither the sheriff nor the surety on his official bond is responsible for a wrongful act of a deputy sheriff unless it was done in violation or in an unfaithful or improper performance of an official duty.

The allegation that the reckless assault and shooting were done while Humphries was on duty as a deputy sheriff, and while he was acting as a deputy, agent, servant and employé of the sheriff, is not the same as to say that the acts were done in violation or in an unfaithful or improper performance of an official act.

In so far, however, as those allegations might be construed to mean that the assault and shooting were the result of a reckless performance of an official act of the deputy sheriff, the allegations manifestly express only the opinion or conclusion of the plaintiff in that respect. And that opinion or conclusion is, in effect, contradicted by the further allegation that the assault and shooting were done maliciously. Without any allegation of fact from which the court or jury might judge whether the wrongful act of the deputy sheriff was done in the performance of an official act, the petition does not disclose a cause of action against either the sheriff or the surety on his official bond.

The judgment appealed from is affirmed.

MONROE, C. J., dissents.

(78 South. 169)

No. 21038.

In re FELICIANA BANK & TRUST CO.

(Feb. 25, 1918.)

1. TAXATION  $\S$  11—BANKS—CAPITAL STOCK.

The legislation in this state respecting the taxation of banks is based upon and is responsive to the federal legislation permitting the taxation by the state of shares in national banks which, because of their character as governmental agencies, would not otherwise be subject to such taxation; and the object and effect of this legislation was to enable the state to reach for taxing purposes the capital of banks as the property of its stockholders, thus placing the burden of state taxation equally upon national and state banks.

2. TAXATION  $\S$  522 — BANKS — SHARES OF STOCK—LIABILITY.

The tax prescribed by Act No. 170 of 1898,  $\S$  27, is on the shares of the bank as the property of its shareholders, and the liability for the tax is that of the shareholders, and not of the bank, which, under the statute, is constituted merely the agency or instrumentality through which the tax is collected; its duty or obligation being simply to pay the tax out of the means or property of the stockholders in its possession—a method of collection supplementary and not exclusive of the ordinary means available for the collection of taxes upon movables.

3. TAXATION  $\S$  522 — BANKS — CAPITAL STOCK—APPRAISEMENT.

Since the amount of the tax against the shareholders of a bank under the statute is dependent upon the valuation placed upon their shares by the taxing authorities, it is manifest that until this appraisement, that is, assessment, is completed and the amount of the tax thereby ascertained, no authority or duty devolves upon the bank, as agent, to appropriate or apply any property or funds of its shareholders to the payment of the tax.

4. TAXATION  $\S$  522 — BANKS — CAPITAL STOCK—ASSESSMENT.

As relates to the function, liability, or authority of a bank, in its capacity as agent, for the payment of the tax upon its shareholders and their shares under the statute, an assessment is completed and the amount of the tax ascertained only upon the deposit of the tax rolls by the assessor. And this is true notwithstanding that the completed assessment, in so far as the direct liability of the stockholders and their shares is concerned, may perhaps relate back to the 1st day of January of the tax year.

5. TAXATION  $\S$  522 — BANKS — CAPITAL STOCK—RECEIVERSHIP.

A proceeding by the state against the liquidator of an insolvent bank for the collection

of the taxes assessed against its shareholders and their shares under the statute cannot be maintained, where it is neither alleged nor proved that the liquidator has, or that the bank had at the time of the deposit of the assessment rolls or on the date of its insolvency, any assets belonging or accruing to the shareholders.

Monroe, C. J., and O'Niell, J., dissenting.

Appeal from Twenty-Fourth Judicial District, Parish of West Feliciana, J. L. Golsan, Judge, to Court of Appeal, First Circuit, there transferred to Supreme Court.

In the matter of the liquidation of the Feliciana Bank & Trust Company. Rule by John H. Clack, Sheriff and ex officio Tax Collector of the Parish of West Feliciana, on the liquidator to collect taxes on the capital stock, surplus, and undivided profits, with interest from date of delinquency. Rule made absolute in the district court, and the liquidator appealed to the Court of Appeal, which declined jurisdiction and transferred the case to the Supreme Court. Judgment reversed, and decree that the rule be dismissed.

T. Jones Cross, of Baton Rouge, for appellant. Lawrason & Kilbourne, of St. Francisville (A. V. Coco, Atty. Gen., and Harry P. Gamble, Asst. Atty. Gen., of counsel), for appellee.

In this case, his honor, Mr. Justice LECHE being recused, and their honors being evenly divided in opinion as to the proper determination to be made of the issues involved, Judge EMILE GODCHAUX of the Court of Appeal, Parish of Orleans, having been called upon by previous order of this court to sit in the case, pronounced the judgment of the court therein in words and figures as follows, to wit:

The tax collector is seeking to collect from the liquidator of the Feliciana Bank & Trust Company, an admittedly insolvent state bank now in process of judicial liquidation in this proceeding at the instance of the state bank examiner, the taxes for the year 1918, im-

posed pursuant to section 27 of Act 170 of 1898, which, so far as presently pertinent, prescribes:

"That no assessment shall hereafter be made under that name, as the capital stock of any national bank, state bank, banking company, etc., whose capital stock is represented by shares, but the shares shall be assessed \* \* \* to the shareholders, who appear as such upon the books; \* \* \* and all taxes so assessed shall be paid by the bank, \* \* \* which shall be entitled to collect the amount from the shareholders," etc.

The defendant resists payment on the ground that the tax is an obligation, not of the bank, but of the shareholders, which the bank is required to pay merely as the agent of the shareholders when it has funds or property belonging to them in its possession; and that it cannot be made to pay this tax, because the bank had not at the time when the tax was imposed, nor when the bank went into liquidation, and because the liquidator has not now, any funds or property whatever belonging or accruing to the stockholders, the total assets of the bank at all such times and presently being insufficient to discharge its obligations to its creditors.

This appeal from a judgment condemning the liquidator to pay the tax from the assets of the defunct bank presents primarily the question of whether the tax is imposed upon the bank or upon its shareholders, and if upon the latter, then a determination of the function and duty of the bank with relation to the payment of the tax.

[1] 1. It will be noted that the statute requires that no assessment shall be made of the capital stock of any national or state bank, but that the shares shall be assessed to the shareholders. This special provision of our statute of 1898, applicable to banks alone, first appeared, substantially in the same form, in Act No. 8 of 1878, Ex. Sess. § 1, par. 8, and has repeatedly been incorporated in the subsequent revenue laws of the state, namely, Act 77 of 1880, § 48, Act

96 of 1882, § 28, Act 98 of 1886, § 28, Act 85 of 1888, § 27, and Act 106 of 1890.

This system of assessment or taxation with respect to banks, inaugurated at or about the same time in nearly every state of the Union, was manifestly based upon and responsive to the federal legislation of 1864 and 1868 (United States Rev. Stat. § 5219 [U. S. Comp. St. 1916, § 9784]), which expressly permitted the taxation by the states of the shares of national banks, governmental agencies, which but for this permissive legislation would not have been subject to any taxation by the state.

Construing a statute of Kentucky, similar to this, it has been said:

"But it is argued that the banks, being instrumentalities of the federal government, by which some of its important operations are conducted, cannot be subjected to such state legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from state taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. Maryland* [4 Wheat. 316, 4 L. Ed. 579], has been repeatedly affirmed by the court. \* \* \*

"If the state of Kentucky had a claim against the stockholder of the bank \* \* \* it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does with regard to the tax of the state on the bank shares."

*National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701.

And this court, construing Act 8 of 1878, Ex. Sess. § 1, par. 8, has noted this change in our state tax laws, which prior thereto had taxed the capital of banks (Act 68 of 1870, Ex. Sess. § 1; Act 42 of 1871, § 1, subd. 8), and has recognized the purpose and effect of such legislation:

"The difference between this statute and former revenue laws is simply in the mode of taxing the same thing. Heretofore, the capital was assessed against the bank. Under this act, it is assessed against its stockholders. There is no double taxation here; for, as we have seen, when the capital is assessed to the shareholders, it is not assessable against the bank. \* \* \*

"It may not be amiss to add that the shares

are assessed to the stockholders individually, and it may well be doubted whether the bank can disturb an assessment made against them. \* \* \*

"The real object of the change of method is manifest. Under the laws of the United States, the capital stock of the national banks is exempt from taxation by any state or municipal authority; but the shares of the stockholders in such banks are thought to be taxable.

"The purpose and effect, therefore, of the act of 1878, were, in reality, to lessen the burdens of taxation on the state banks, and other property holders of the state, by compelling the stockholders of the national banks to contribute to the expenses of the government, whose protection they enjoy."

*City v. Canal & Banking Co.*, 32 La. Ann. 157.

And it may here be observed that, in addition to relieving state banks from the disadvantage of a burden of taxation that competing national banks did not theretofore bear, the statute, by taxing the shares, enabled the state to reach for the purposes of taxation the investment of banks in governmental securities, both state and national. *First National Bank v. Board*, 41 La. Ann. 181, 5 South. 408.

[2] 2. The cases cited, all holding that the tax is on the shares as the property of the shareholders, and that the liability for the tax rests upon the shareholders and not upon the bank, accord with the uniform jurisprudence of this court, which moreover establishes, with equal uniformity, that the bank, under the statutes, is constituted merely the agency or instrumentality through which the tax is collected; its duty being simply to pay the tax out of the means or property of the stockholders in its possession.

In *Bank v. Bouny*, 32 La. Ann. 239, in considering Act 8 of 1878, Ex. Sess. § 1, par. 8, in connection with the peculiar provisions of the charter of the Citizens' Bank, the court said:

"Where the capital, assets, and profits of a bank are at the disposal of its shareholders, the state may perhaps compel the bank to pay their taxes on stock. But such legislation with reference to the Citizens' Bank would be violative of the vested rights of others."

The next revenue statute (Act 77 of 1880) extended this method of taxation so as to embrace other corporations as well as banks, and was considered in a case wherein the Cotton Exchange successfully enjoined the attempt to collect from it the tax levied upon the shares of its shareholders under section 48 of the statute; its contention, which was sustained, being that the tax did not apply to a nondividend-paying corporation, and that such a corporation, having no property of the stockholders at its disposal, could not be made to pay the tax on the latter's behalf. Upon the latter point, the concurring opinion of Justice Fenner was to this effect:

"Whatever the legislative intent, it did not lie within the legislative power to make a corporation of this character liable for taxes avowedly levied upon, and due by its shareholders alone, and as independent persons."

And in the opinion of the court, delivered by Chief Justice Bermudez, we find:

"The actual shares shall be assessed to the shareholders, and that 'all the taxes so assessed shall be paid by the corporation, which shall be entitled to collect the amounts from the shareholders or their transferees.' Section 48.

"The validity of such mode of assessment and of collection was attacked, but the Supreme Court of the United States has in two cases maintained the same, for the reason that the corporation was made to pay 'out of the means of the stockholder under its control,' and did so by withholding the assessment out of the dividends. 9 Wall. 362 [19 L. Ed. 701; Delaware Railroad Tax] 18 Wall. 230 [21 L. Ed. 888]. \* \* \*

"The mode which this act provides for the payment of the tax by the corporations embraced within the section is: 'That the taxes so assessed (to the shareholders) shall be paid by the bank, company, firm, association or corporation, which shall be entitled to collect the amounts from the shareholders or their transferees.' It is destructive of defendants' theory.

"The corporation is distinct from its stockholders, as concerns the ownership of property. If the corporation could be legally made liable for the debts of its stockholders, then, constitutionally, the property of one citizen could be legally subjected, independent of any contract, to the debts of another. This cannot be done."

Cotton Exchange v. Board, 35 La. Ann. 1154.

Under the general revenue act of 1886 (section 28 of Act 98 of 1886) it was held:

"In suits to reduce and annul assessments of shares of capital stock to the shareholders in a corporation, it is unnecessary to join the shareholders in the suit. Section 28, of Act 98 of 1886, constitutes the corporation the agent of the shareholders for the purpose of assessment, and the payment of the tax assessed." *Planters' Co. v. Assessor*, 41 La. Ann. 1137, 6 South. 809.

And precisely the same ruling was made by the federal District Court of this circuit. *Whitney National Bank v. Parker* (C. C.) 41 Fed. 402.

Again, dealing with the assessment of banks under the same statute, this court has said:

"There can be no question that the tax from which exemption is claimed is not a tax on the capital of the bank; but it is a tax on the shares because the statute expressly declares" so. *First National Bank v. Board*, supra.

Substantially the same language was used in construing the revenue law of 1888 (Act 85 of 1888, § 27):

"The tax is levied, not on the capital or stock of the corporation, but on the shares as the property of the individual shareholders. Such is the express language of the law." *Board v. Thoman*, 42 La. Ann. 605, 8 South. 482.

To like effect with respect to the same statute is *Home Insurance Co. v. Board*, 42 La. Ann. 1131, 8 South. 481.

And regarding section 27 of the next revenue law (Act 106 of 1890), it was held:

"As the mere agent of the shareholders, for paying the tax, the bank's interest in the mere mechanical arrangement of the assessment is very remote." *Castles v. City*, 46 La. Ann. 542, 15 South. 199.

The provision in question of the present revenue law (section 27 of Act 170 of 1898) was before this court in another *Citizens' Bank Case*. Having heretofore been denied the right to collect such a tax from this bank as the agent of its stockholders (*Bank v. Bouny*, supra), the taxing authority endeavored to secure payment from the stockholder him-

self; but this court,\*Justices Nicholls and Monroe dissenting, held that the charter exemption of the bank was broad enough to exempt the stockholders and their shares from such taxation. *Penrose, City Tres., v. Chaffraix*, 106 La. 250, 30 South. 718.

Still more recently, in a case involving an attempted taxation of Stock Exchange shares, it was stated:

"The first contention of plaintiffs is that the shares of no corporation, except banking concerns, are assessable for taxation under the present revenue laws of the state, and that all other corporations are assessable upon all their taxable property. Sections 27 and 28, Act No. 170, pp. 362, 363, of 1898. \* \* \*

"These sections show radical differences between the assessment of banking corporations and that of all other corporations. In the first place, an incorporated bank is not taxable on its assets other than real estate, while all other corporations are taxed on all their property, movable and immovable, corporeal and incorporeal.

"In the second place, the shares in banks are taxed against the individual shareholders, while no mention is made of shares in the sections providing for the taxation of other corporations. \* \* \*

"The single exception of real estate proves the intent of the lawmaker not to tax the shareholders and the corporation on the same values, because provision is made for the deduction of the assessed value of real estate from the assessed value of the shares. \* \* \*

"In *New Orleans Cotton Exchange v. Board*, 35 La. Ann. 1154, it was held by a majority of the court, the Cotton Exchange was not a money-making and dividend-paying corporation, as contemplated by Act No. 77, p. 88, of 1880, and could not be charged with the payment of taxes assessed against its shareholders."

*Chassaniol v. Board*, 120 La. 777, 45 South. 604.

See, also, *Allgeyer v. Board*, 121 La. 149, 46 South. 134.

And, finally, while on the subject of the Louisiana cases, it is here pertinent to remark that the method of the collection of the taxes through the bank, as agent, is not exclusive, but merely supplementary to the ordinary means which the state under the statute has at its disposal for the collection of taxes against other individuals. For the statute expressly provides that in the event that the tax cannot be collected through the

bank, as agent, then the shareholder may be proceeded against "by rule to produce, and all other proceedings provided for in this act for the collection of taxes on movable property." Act No. 170 of 1898; § 27.

And the decisions of the court furnish at least one instance wherein the state had recourse to the ordinary method of collection against the stockholder himself by impounding his property in the hands of the corporation. *Parker v. Sun. Insurance Co.*, 42 La. Ann. 1172, 8 South. 618.

It will thus be seen that, by an unbroken line of consistent adjudications it has been firmly established in this state that the tax is on the shares and the shareholders, not on the bank or its property; and that under the statutes, the bank is designated merely as the agency or instrumentality through which this tax is to be paid, from the means, funds, or property of the stockholders in its possession—an interpretation of the statute universally upheld in every jurisdiction where this method of taxation with respect to banks has been enacted. The number of cases is overwhelming, but the more pertinent are as follows: *Charleston Nat. Bank v. Melton* (C. C. W. Va.) 171 Fed. 743; *First Nat. Bank v. Commonwealth of Kentucky*, 9 Wall. 353, 19 L. Ed. 701; *Cummings v. Mer. Nat. Bk.*, 101 U. S. 153, 25 L. Ed. 904; *Lionberger v. Rowse*, 9 Wall. 468, 19 L. Ed. 721; *Hager v. Am. Nat. Bk. (Ky.)* 159 Fed. 396, 86 C. C. A. 334; *First Nat. Bank of Aberdeen v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Merchants' Nat. Bank v. Penn.*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; *Whitney Nat. Bank v. Parker* (C. C.) 41 Fed. 402; *Citizens' Nat. Bank v. Kentucky*, 217 U. S. 443, 30 Sup. Ct. 532, 54 L. Ed. 832; *Batesville First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988; *Commonwealth v. Citizens' Bank*, 117 Ky. 946, 80 S. W. 158; *Relife v. Col. Life Ins. Co.*, 11 Mo. App. 374-377; *First Nat. Bank v. Meredith*, 44 Mo. 500; *Farmers' & Traders' Bk.*

v. Hoffmann, 93 Iowa, 119, 61 N. W. 418; Baker v. King County, 17 Wash. 622, 50 Pac. 481; Stapylton v. Thaggard, 91 Fed. 93, 33 C. C. A. 353; Shainwald v. First Nat. Bk., 18 Idaho, 295, 109 Pac. 257; Hershire v. First National Bk., 35 Iowa, 272; Jefferson County Sav. Bk. v. Hewitt, 112 Ala. 546, 20 South. 926; State v. Carterville Bk., 180 Mo. 717, 79 S. W. 943; Bressler v. Wayne County, 82 Neb. 758, 118 N. W. 1054; Truby's Appeal, 96 Pa. 52; Union Bank v. Richmond, 94 Va. 316, 26 S. E. 821.

[3-5] 3. Since the amount of the tax against the shareholders of a bank is dependent upon the appraisal or estimate made of the value of their shares by the taxing authorities, it is manifest that until this appraisal, that is, assessment of the shares, is completed and the amount of the tax thereby ascertained, no authority or duty devolves upon the bank, as agent, to appropriate or apply any property or funds of the shareholders in its possession to the payment of the tax.

Under Act 170 of 1898, § 1, the tax levied is "six mills on the dollar of the assessed valuation of all property," and the method provided by the statute for making the annual valuation or assessment of property (other than in the parish of Orleans) is this:

The assessor must prepare by June 1st his listing and appraisal of all property (section 22); and these estimative lists are thereafter submitted for approval or disapproval by the police jury, which must meet as a reviewing board on the 1st Monday in July (section 24). As fast as the approval of the police jury is obtained, the assessor is required to prepare from these "lists" and to deposit in the offices of the clerk of court, the tax collector and the auditor, respectively, three (3) "tax rolls," said deposit being the tax collector's warrant "to collect all taxes" (section 30), and constituting "prima facie evidence" and "full notice to each taxpayer that the listing, assessment and valua-

tion has been completed" (sections 34 and 35). And though perhaps immaterial here, it may be added that the language of the statute prescribes that the taxes shall be due and the lien thereof attach as soon as the tax rolls are thus deposited (sections 40 and 71).

From the transcript herein it appears that the tax rolls were not deposited by the assessor until October, 1913, and consequently it was not until then that the valuation or assessment was complete according to the specific declarations of the statute. It is as of that date that the liability of the bank, as agent, for the payment of the tax must be gauged. In so far as the liability of the stockholder and his shares are concerned, a completed assessment perhaps relates back to the 1st day of January, but as to the bank, in its capacity as agent, its duty in the premises necessarily dates only from the time that the amount of the tax is determined.

But there is neither pleading nor proof in the record that the bank or its liquidator had in hand in October, 1913, any fund whatever belonging or accruing to the stockholders. To the contrary, it is admitted that the bank was forced into liquidation in August of that year because of its insolvency, and from the statement of counsel upon the argument of the case, we entertain no doubt that the bank's entire capital and surplus had vanished, and that its remaining assets would not liquidate the bank's outstanding debts to its depositors and creditors. This proceeding, therefore, to recover from the bank or its liquidator the tax imposed upon the shares of its stockholders, cannot be maintained.

For, as we have noted, this court, as early as 1880, has held that a bank, as agent, was free from any responsibility or liability for the tax, where its charter contract places the avails of the stockholders beyond its control or disposal (Bank v. Bouny, 32 La. Ann. 239); while again, in 1883, it has held, in a decision which has been cited with approval

as recently as 1908 (*Chassaniol v. Board*, 120 La. 777, 45 South. 604), that a corporation without funds or property of stockholders in its hands could not, in its capacity as agent, be condemned for the tax (*Cotton Exchange v. Board*, 35 La. Ann. 1154).

The federal court, in interpreting the Massachusetts statute, has held:

"That no suit for this tax can be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared; for, there being nothing from which the receiver can be reimbursed, the tax will fall upon the assets of the bank, which belong to its creditors, and thereby violate the rule that a state cannot tax the capital stock of a national bank." *City of Boston v. Beal* (C. C.) 51 Fed. 306, affirmed in 55 Fed. 26, 5 C. C. A. 26.

And this language was quoted with approval by the Supreme Court of Washington in *Baker v. King County*, 17 Wash. 622, 50 Pac. 481.

Again, the federal Court of Appeals of this circuit, Judges Parlange and Pardee participating, has ruled:

"The case made by the bill, showing the insolvency of the bank and the appointment of a receiver, is one which releases the receiver and any assets in his hands from liability to pay the tax. See *Rosenblatt v. Johnston*, 104 U. S. 462 [26 L. Ed. 832]. As we construe the cases, from *First Nat. Bank v. Commonwealth*, 9 Wall. 353 [19 L. Ed. 701], to *First Nat. Bank v. Chehalis Co.*, 166 U. S. 440 [17 Sup. Ct. 629, 41 L. Ed. 1069], the bank is made to pay the taxes assessed by the state against its shareholders, when the state statutes lay such duty upon the bank, upon the theory that the shares are valuable, and that the bank has assets in its hands belonging to the shareholders from which it can recoup. Where a bank is insolvent, and has passed into the hands of a receiver, the shares are generally worse than worthless; and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares.

"In such case, we are of opinion that the tax assessed against the shares \* \* \* cannot be collected from the receiver, or from assets in his hands. The case of *City of Boston v. Beal* (C. C.) 51 Fed. 306, is directly in point; the Massachusetts statute being substantially the same as the statute of Florida in providing that the shares shall be assessed to the owner, and the tax paid by the bank." *Stapylton v. Thaggard*, 91 Fed. 93, 33 C. C. A. 353.

Particularly pertinent is the language of the Supreme Court of Iowa:

"To render, under our statute, \* \* \* a national bank, organized under the federal banking law, liable for the payment of taxes due from its shareholders, it must be averred and shown that the bank now has or has had in its possession dividends or other money or property belonging to the delinquent shareholder. The bank is not absolutely liable, independent of such showing." *Hershire v. First Nat. Bank*, 35 Iowa, 272, followed in *Farmers' & Traders' Bank v. Hoffmann*, 93 Iowa, 119, 61 N. W. 418.

See, also, *Shainwald v. First Nat. Bank*, 18 Idaho, 295, 109 Pac. 257, and *Reife v. Columbia Life Ins. Co.*, 11 Mo. App. 374.

The judgment is accordingly annulled, and reversed, and it is now decreed that the rule herein of John H. Clack, sheriff and ex officio tax collector of the parish of West Feliciana, be dismissed at mover's costs in all courts. Reversed.

See dissenting opinion of O'NIELL, J., in which MONROE, C. J., concurs, 78 South. 174.

(78 South. 237)

No. 22604.

ROGERS v. LOUISIANA RY. & NAV. CO.

(Feb. 25, 1918. Rehearing Denied April 1, 1918.)

(Syllabus by Editorial Staff.)

1. DEATH §58(1)—PRESUMPTIONS—CONTRIBUTORY NEGLIGENCE.

Where the presence of deceased, who was lying down between the rails of a track, was unaccounted for, it would be assumed as a legal conclusion that he was guilty of gross negligence amounting to recklessness.

2. DEATH §58(1)—BURDEN OF PROOF—LAST CLEAR CHANCE.

Where deceased, killed when lying between the rails of a track, was guilty of gross negligence, his widow could recover only if she showed that the accident might have been avoided by the exercise of ordinary care on the part of defendant's engineer after the danger of the situation was or should have been discovered.

### 3. RAILROADS ~~6398~~(3)—INJURY ON TRACK— NEGLIGENCE—EVIDENCE.

In an action by the widow of one killed while lying between the rails of a track, evidence *held* not to show a want of exercise of ordinary care on the part of defendant's engineer after the dangerous position of deceased was or should have been discovered.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; James Andrews, Judge.

Action by Mrs. Sadie Rogers against the Louisiana Railway & Navigation Company. Judgment for plaintiff, and defendant appeals. Judgment reversed, and suit dismissed.

Wise, Randolph, Rendall & Freyer, of Shreveport, and Thornton, Gist & Richey, of Alexandria, for appellant. R. F. Liebler, of Alexandria, for appellee

LECHE, J. On the night of October 15, 1918, between 10 and 11 o'clock, a passenger train of defendant company ran over and killed Ed. Rogers, who was lying down between the rails of defendant's railroad track just outside the limits of the city of Alexandria.

The widow of Rogers, alleging that her said husband was killed by the negligence of the employes of defendant in charge of said train, claims damages in the sum of \$20,000 as a result of said killing and prays for judgment accordingly.

The district court allowed her \$5,000, and defendant appeals.

The train which killed the deceased left the station in Alexandria at about 10:25 p. m., and was proceeding on its way to New Orleans, when, after passing the Alexandria & Western Railroad crossing, the engineer recognized the form of a human being lying flat on the ground, between the rails some 50 feet ahead of him. S. E. Angle, the engineer in charge of the train, further testified that he was then running at a speed of about 20 miles per hour, and immediately applied the

brakes, but was only able to stop his train after the engine, tender, and baggage car had passed over the body of the man.

The mangled form of Ed. Rogers was then picked up under the rear end of the baggage car and brought back to Alexandria. The engineer further says that Rogers was lying flat on his back, lengthwise with the track, his head away from the engine, absolutely motionless until just before the engine struck him, when he slightly raised his head as if trying to see what was coming. He further says that he had seen a dark object on the track some 300 feet ahead, but never suspected that it was a human being, until about 50 feet from it, and that with all the diligence he could exercise it was impossible for him to stop his train any quicker than he did.

The place where the accident occurred is about 204 feet east of the crossing of the Alexandria & Western Railroad, on the outskirts east of the city of Alexandria. On one side of the track is an open field, on the other side a thicket. There are no human habitations in that neighborhood, and there are no public roads near or crossing the railroad track. In other words, it is a place where no one would reasonably expect to find any human being between 10:30 and 11 o'clock at night.

[1, 2] The presence of Rogers at that place is unaccounted for and will likely forever remain a mystery. Was he sick, intoxicated, or did he want to depart this life on a railroad track; no one knows. In the absence of any explanation, it must be assumed as a legal conclusion that he was guilty of gross negligence amounting to recklessness, and his widow can only recover if she can clearly show that the accident might have been avoided by the exercise of ordinary care on the part of the locomotive engineer after the danger of the situation was, or should have been, by him discovered.



[3] A great deal of testimony was elicited from several locomotive engineers on this point. Some testified that they could distinguish a human body lying as described by Engineer Angle, anywhere from 350 to 500 feet ahead of an engine; but those who testified to this effect all admit that it is merely a matter of opinion on their part, and not one of them ever had the misfortune to be situated as was the engineer on the train that killed Rogers. One of defendant's engineers testified that he once in the nighttime, ran over a man who was lying across the track on a trestle; that the man's body was between the ties and his legs across one of the rails; that he had one hand sticking up and looked to him like an animal of some kind; that he was only able to distinguish the object within 100 to 150 feet, was running 30 miles an hour, and was unable to avoid the accident.

As a matter of fact, and it is admitted by most of the engineers who were placed upon the witness stand, it is extremely difficult at night to distinguish objects on railroad tracks, and the distance at which they can be recognized varies with their size and shape, their color and the color of the background, their motion or lack of motion, weather conditions, and possibly many other surrounding circumstances. The place where they are seen may sometimes offer a clue to their identification and at other times mislead the mind as to their real nature. Most frequently any object on the track at nighttime looks dark, and, as stated by these engineers, if the speed of passenger trains was checked or if the trains were stopped every time dark spots appear on the track, it would be impossible to efficiently operate passenger trains. The testimony of Angle appears to us to be truthful, to comport with reason, and to outweigh the opinions of experts who have never actually been in a similar predicament.

Our conclusions are that the train which caused the death of plaintiff's husband was

being operated with ordinary care and that plaintiff's demand should be refused.

It is therefore ordered that the judgment appealed from be set aside and reversed, and plaintiff's suit dismissed, with costs.

(78 South. 239)

No. 22722.

McLAUGHLIN v. STALLINGS.

(Feb. 25, 1918. Rehearing Denied April 1, 1918.)

(Syllabus by the Court.)

LANDLORD AND TENANT ~~§~~164(7)—PERSONAL INJURY TO TENANT—LIABILITY.

A landlord is not liable in damages for personal injuries suffered by the tenant in consequence of a dangerous condition of the leased premises, of which the tenant had knowledge and assumed the risk.

Monroe, C. J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Mrs. Kate R. McLaughlin against Mrs. Olive A. Stallings. Judgment for defendant, and plaintiff appeals. Affirmed.

Andrew B. Booth, Jr., and Wm. H. Byrnes, Jr., both of New Orleans, for appellant. McCloskey & Benedict, of New Orleans, for appellee.

O'NIELL, J. The plaintiff prosecutes this appeal from a judgment rejecting her demand for damages for personal injuries.

A contractor, employed by the defendant to ratproof the residence owned by her and rented and occupied by the plaintiff, removed the steps temporarily from the front door, and the plaintiff, going out before daybreak to get the morning's milk, fell from the front door to the ground, a distance of about three feet, and was seriously hurt.

The defense is that the carpenter who re-

moved the steps took the precaution of nailing boards across the open door temporarily to prevent any one from walking out, and that the boards were removed at the plaintiff's request and upon her assuming the risk. The defendant also pleaded that the carpenter who removed the steps was employed by an independent contractor, for whose negligence—if he was negligent—the defendant was not responsible. That defense, however, was abandoned in this court, and it is admitted by both parties that the correctness of the judgment appealed from depends solely upon the question of fact whether boards were nailed across the door by the carpenter and then removed at the request of the plaintiff.

The ratproofing done in compliance with an ordinance of the board of health consisted in constructing a cement or concrete chain wall under the sills entirely around the house. It was necessary to remove the front steps to put in the wooden forms or molds for the concrete under the front door. The steps were removed on a Monday and replaced that evening. They were removed again the next day and the concrete mixture was poured into the forms. The concrete had not set or hardened sufficiently that evening for the steps to be put back in place. The contractor and a carpenter testified that the latter nailed three or four pieces of old flooring, spaced about 6 inches apart, across the open door, on the outside, behind the open blinds, obstructing the opening for a height of about 3 feet. The contractor testified that, having witnessed the nailing up of the boards, he walked away to see that the steps at the rear of the house were in position. The carpenter testified that the plaintiff then, being in the house, came to the front door and demanded that the obstruction be removed, and that he refused to obey the demand without the contractor's consent. The latter and the carpenter both testified that the contractor

then came forward, and, when the plaintiff repeated her demand that the boards be taken down, he replied, "All right; it's up to you; if anything happens, it is up to you," and that the carpenter then knocked down the boards.

The plaintiff, testifying in the case, denied emphatically that any boards were nailed across the door, or that she had had any conversation with either the contractor or the carpenter in regard to the matter. In fact, she said she did not know, before the accident, that the steps had been removed.

Another carpenter, who had worked on the ratproofing of that house and a neighboring house that was being ratproofed for the defendant at the same time, was called as a witness for the plaintiff, and denied that any boards were nailed across the door from which the steps were removed. But the witness admitted that he had gone to work on the other house at 3 o'clock in the afternoon before the accident, and it does not appear that he had any knowledge of the matter in dispute. Another workman, called as a witness to corroborate the plaintiff's statement that no attempt was made to guard the door from which the steps were removed, testified merely that there were no boards across the open door on the morning of the accident.

The decision of the case, therefore, depends upon whether we should believe the statement of the contractor and the carpenter, or that of the plaintiff, on the question in dispute. There being no reason to doubt the veracity of any of the three witnesses, the preponderance of proof is in favor of the defendant. There are some differences in the testimony given by the contractor and the carpenter, in matters of detail; but they are not of sufficient importance to warrant a conviction of perjury. As their testimony cannot be rejected on any other theory than that they committed perjury, and as we do not believe they committed perjury, we must

assume that the plaintiff forgot the incident which she denied had occurred.

The landlord is not responsible for the tenant's being injured in consequence of the dangerous condition of the premises, of which the tenant had knowledge and assumed the risk.

The judgment is affirmed.

MONROE, C. J., dissents.

(78 South. 240)

No. 22873.

# STATE v. SHOEMAKE.

(Jan. 3, 1918. On Rehearing, April 1, 1918.)

(*Syllabus by the Court.*)

## 1. CRIMINAL LAW §1119(1)—APPEAL—RECORD—SHOWING OF PREJUDICE.

The opening of court with prayer by the judge is not usual; and, in the absence of the petitions of the prayer showing prejudice or injury, it is not cause for setting aside and reversing a verdict and sentence of the trial court.

## 2. CRIMINAL LAW §1153(1) — APPEAL — IMMATERIAL EVIDENCE.

Immaterial evidence should not go to the jury. It has a tendency to prolong the trial, to confuse the minds of the jurors, and to becloud the issues. But the court will accept the trial judge's finding to the effect that the evidence was material, unless it be clearly shown that it was immaterial.

## 3. CRIMINAL LAW §1171(1) — APPEAL — HARMLESS ERROR — REMARKS OF DISTRICT ATTORNEY.

The Supreme Court will not set aside a verdict approved by the trial judge on the ground of improper remarks made by the district attorney, unless that court were thoroughly convinced that the jury was influenced by such remarks, and that the remarks contributed to the verdict found.

Appeal from Fifth Judicial District Court, Parish of Winn; Cas Moss, Judge.

George Shoemake was convicted of murder, and he appeals. Affirmed.

W. M. Wallace, of Winnfield, for appellant. A. V. Coco, Atty. Gen., and Julius T. Long, Dist. Atty., of Winnfield (Vernon A. Coco, of New Orleans, of counsel), for the State.

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PROVOSTY, J. The accused was convicted, without capital punishment, of having murdered one Mrs. Jesse Roberts.

He objected to the juror E. H. Buchanan, on the ground that his name did not appear on the venire list, that the name appearing was E. A. Buchanan, and that the person intended to be designated thereby was more probably E. A. Buchan than E. H. Buchanan, because a person by the former name had lived in ward 4 a great many years and had but recently moved to ward 7. The learned trial judge was satisfied that E. H. Buchanan was the right man, a conclusion we find no reason for doubting the correctness of.

The court was opened with prayer. This was in the presence of the jury. A minister of the gospel and another witness were allowed, over objection, to testify at considerable length to the decedent's having joined the church shortly before her death, and having attended religious meetings. In his argument to the jury the district attorney brought the element of religion into play by winding up a fervid period with the following:

"You are called upon, gentlemen, to say whether or not under the proof in this case there is anything to Christian experience and Christianity and whether Christianity in this parish is dead."

In opening the court with prayer there may be no harm, although we have never heard of such a thing being done before; in showing that the decedent had joined the church, and had thereafter continued to attend church meetings, there may have been no harm; and in this appeal to the religious sentiment of the jury there may have been no special harm. But while this may be so when these things are considered separately, or disconnectedly, we can readily understand how together, or in combination, their effect might well have been to envelop the trial in an atmosphere of religion, such as might have beclouded the issues, to the dis-

advantage and prejudice of accused, and thus deprived him of the right which an accused has that his trial should be conducted in the clear, unmisted light of the law and the evidence. The transcript leaves the judicial mind in grave doubt whether this did not happen. If this evidence as to the joining of the church, etc., was to have no effect, why introduce it? And if the appeal to the religious sentiment was to have no effect, why make it? The safer course is, we think, to grant a new trial.

The other bills of exception are without merit.

The judgment is therefore set aside, and the case is remanded for trial.

O'NIELL, J., concurs in the decree.

#### On Rehearing.

SOMMERVILLE, J. A review of the record convinces us that the matters before considered, and forming the basis of our opinion, are not sufficient upon which to set aside and reverse the verdict and sentence in this case.

[1] Defendant objected to the offering of prayer by the judge at the opening of the court, in the presence of the jury. He says that the prayer could only have the effect of prejudicing the jury against the accused, but he does not recite any of the petitions of the prayer offered, or tell how he was affected prejudicially. In the absence of prejudice or injury being shown by defendant, the court cannot presume that either was done to him.

The judge says that it is his custom to open court each day with a prayer, general in its terms, and that the jury, and no particular officer of the court, was mentioned in the prayer on the occasion referred to. Since such was the custom of the court, and no one was mentioned in the prayer, we fail to see how the prayer could have prejudiced the jury for or against the accused; and we believe that it did not.

A prayer for divine guidance in discharging

the duties of the high office which the judge administers would suggest to the mind that he who offered the prayer was a virtuous and a merciful man, and that those qualities, combined with a knowledge of law, would make of him a good judge. It does not suggest injury being done to any one.

The opening of court with prayer by the judge is not usual, but it is not forbidden. The crier of the court usually performs that duty when he opens court and cries, "God save the state and this honorable court." No one has ever suggested that that officer had acted prejudicially or injuriously to an accused person, or to any one else who was before the court.

[2] Regarding the complaint that immaterial evidence was admitted, we are disposed to accept the trial judge's finding to the effect that the evidence was material. We are not in so good a position as he was to rule upon the point. The bill is not sufficient to show that irrelevancy.

The accused is assured of a speedy trial, and he would be deprived of that right if immaterial evidence to any great extent were permitted to be introduced on the trial. And, further, immaterial evidence would serve to confuse the minds of the jurors, and it would becloud the issues. But the trial of this case did not consume much time; the testimony complained of was short, and it was not calculated to confuse.

[3] Coming now to the remarks of the district attorney about Christianity, which were most general in terms, we fail to see anything objectionable. Accused did object to them, and he filed a bill. But a bill of exceptions must be taken to a ruling by the court on some objection made in the course of the trial, or to a part of the judge's charge.

If the remarks of the district attorney were objectionable in the opinion of the accused, he should have requested the judge to stop the district attorney, or that he charge the jury to disregard the objectionable

statements. Defendant did not make any such request of the judge; he invoked no ruling by the court with reference thereto, and he cannot therefore be heard to complain thereof. *State v. Boswell*, 45 La. Ann. 1158, 14 South. 79; *State v. Young*, 114 La. 686, 38 South. 517; *State v. Brannon*, 133 La. 1027, 63 South. 507; *State v. McKowen*, 126 La. 1075, 53 South. 353; *State v. Oteri*, 128 La. 930, 55 South. 582, Ann. Cas. 1912C, 878.

To justify the Supreme Court in setting aside a verdict approved by the judge on the ground of improper remarks made by the district attorney it would have to be very thoroughly convinced that the jury was influenced by such remarks, and that they contributed to the verdict found. *State v. Brown*, 126 La. 12, 52 South. 176; *State v. Montgomery*, 121 La. 1005, 46 South. 997; *State v. Mitchell*, 119 La. 374, 44 South. 132; *State v. Young*, 114 La. 686, 38 South. 517.

The remark of the district attorney with reference to Christianity was not calculated to have any influence on the minds of the jurors, and it certainly did not contribute to the verdict found. The judge states in his per curiam to a bill of exceptions that defendant was charged with the murder of a female child some 16 years of age, yet the verdict found him guilty without capital punishment. The remark of the district attorney appears, if it had any effect, to have been favorable to the accused.

The judgment appealed from is affirmed.

(78 South. 241)

No. 22171.

DUPRE v. COLEMAN.

(Feb. 25, 1918. Rehearing Denied April 1, 1918.)

(Syllabus by the Court.)

MASTER AND SERVANT — PARTNERSHIP — 200 — WORKMEN'S COMPENSATION — PERSONAL INJURY — PARTIES.

One who suffers personal injuries while working for a partnership and as a result of

the employment cannot maintain an action against a member of the partnership alone, either for damages for the neglect of the employer to perform a duty required by law of a master to his servant, or for compensation for the disability suffered by the employe, on the allegation that the individual defendant was the employer.

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; B. H. Pavy, Judge.

Action by John Dupre against R. H. Coleman. Exceptions sustained, and suit dismissed, and plaintiff appeals. Judgment amended to dismiss the suit against defendant individually, reserving to plaintiff any right of action against defendant's partnership and its members.

E. T. Lewis and R. Lee Garland, both of Opelousas, for appellant. W. J. Sandoz, of Opelousas, and J. Zach Spearing, of New Orleans, for appellee.

O'NIELL, J. Having suffered personal injuries in an accident while employed in a sawmill, the plaintiff based his suit upon the allegations that the defendant was his employer, proprietor of the mill. He alleged that the Employers' Liability Act was unconstitutional, and he therefore prayed for damages under article 2315 of the Civil Code for the alleged neglect of the employer to provide a safe place and safe tools for the work to be done. In the alternative, that is, if the Employers' Liability Act should be held valid, he prayed for compensation under the statute for his physical disability.

The defendant filed the following exceptions to the suit, viz.: (1) That the suit was improperly brought against him, the defendant, instead of being brought against the co-partnership of R. H. Coleman & Co., composed of the defendant and J. S. Coleman; (2) that, if that plea or exception should be overruled, the suit was premature; and (3) that, if the first plea or exception should be overruled, the alternative demands of the plaintiff were inconsistent, and he should be required to elect whether to claim dama-

ges under article 2315 of the Civil Code or compensation under Act No. 20 of 1914.

On the evidence heard, the district court held that the exceptions were well founded and dismissed the suit. The plaintiff prosecutes this appeal.

As the testimony was not reduced to writing, the parties have submitted the matter to this court on an agreement as to the facts that were proven, viz.: The mill was being operated and the business carried on by a partnership styled R. H. Coleman & Co., composed of the defendant and his father, J. S. Coleman, when the plaintiff was employed and when the accident occurred. All contracts for timber for the mill were made in the name of the firm. The firm name, but not the name of either member, appeared on the letter heads, billheads, envelopes and other stationery. Large printed cards, posted at conspicuous places about the mill, giving notice to the employés of the Employers' Liability Act, bore the name of the firm. All of the bank checks and incoming and outgoing invoices were in the name of R. H. Coleman & Co. There is no proof nor admission that the defendant managed the business of the partnership or employed the plaintiff for the firm. The important fact, however, is that the plaintiff was employed by and working for the partnership—not the defendant individually.

Whatever right of action the plaintiff has, either for damages, under article 2315 of the Civil Code (for the neglect of his employer to furnish a safe place or safe tools for the work to be done), or for compensation, under the Employers' Liability Act, is against the employer. Any judgment that might be rendered also against an individual member of the partnership would be based upon his liability as a member of the partnership—not as the employer of the plaintiff—and could only be rendered on allegation and proof of his being a member of the partnership. There is no such allegation in the plaintiff's

petition. On the contrary, the defendant is sought to be held liable, not as a member of a partnership, but as the employer of the plaintiff.

Our conclusion is that the judgment maintaining the defendant's first exception is correct. The other exceptions were only urged in the alternative; that is, in the event the first should have been overruled. The judgment appealed from purports to maintain all of the exceptions.

The judgment is amended so as to dismiss the suit against R. H. Coleman individually, reserving to the plaintiff whatever right of action he may have against the partnership of R. H. Coleman & Co. and the members as such; appellee to pay costs of appeal.

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(78 South. 242)

No. 21042.

**BARONET et al. v. HOUSSIERE et al.**

(Feb. 25, 1918. Rehearing Denied April 1, 1918.)

*(Syllabus by the Court.)*

**TAXATION §804—INVALID TAX TITLE—PRESCRIPTION—CONSTITUTIONAL PROVISIONS.**

The doctrine that the prescription of three years, under article 233 of the Constitution, does not operate as a statute of repose in favor of the holder of an invalid tax title as long as the original owner remains in actual possession of the property, is founded upon the fact or theory that such possession is in continuous conflict with, and a continuous protest against, the claim arising from the tax sale. Hence the doctrine cannot defeat the claim of the owner of a fourth interest in the tax title, in a suit against one who, before acquiring the claim of the original owner, not in possession, bought three-fourths interest in the tax title (by deeds purporting to convey the tax title to the whole property) and acquired possession of the property from the holders of the three-fourths interest in the tax title.

Provosty, J., dissenting.

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Petitory action and suit for partition by Prosper Baronet and others against Eugene

Houssiere and others. From a judgment rejecting their demands, plaintiffs appeal. Judgment annulled, and adjudged that plaintiffs be recognized as the owners of an interest in the land, and that the case be remanded to the district court for trial and decision of suit for partition, and all incidental demands.

Chappuis & Holt, of Crowley, for appellants. Smith & Carmouche and Philip Sidney Pugh, all of Crowley, for appellees.

O'NIELL, J. This is a petitory action for a fourth interest in 320 acres of land, being the south half of a tract designated as section 38, in T. 9 S., R. 1 W., and section 32, in T. 9 S., R. 2 W. The suit is also for a partition of the land. The plaintiffs appeal from a judgment rejecting their demands.

They claim title by inheritance from their mother, Cecelia Simon Baronet, who died in 1892. Her husband, Theodore Baronet, bought a half interest in the land from the heirs of Alexander R. Broussard on the 10th of March, 1891, during the marital community existing between the plaintiffs' parents. Hence a fourth interest in the 320 acres of land became the property of the plaintiffs' mother. Alexander R. Broussard had bought the land from Joseph J. Beauchamp on the 20th of April, 1885.

The whole tract of 640 acres had been confirmed to Valere Bourque on the 9th of July, 1811, per certificate B-1108. It was sold to Joseph J. Beauchamp on the 2d of October, 1871, for delinquent taxes of 1869 and 1870, assessed in the name of Valery Bourque. The tax deed contains a recital that all requirements and formalities of law were complied with, and that the land was sold by the tax collector in 13 lots, 12 containing 50 acres each, and one containing 40 acres, according to a plat furnished by a surveyor. The deed was recorded in the con-

vveyance records in the recorder's office on the 16th of November, 1871.

The defendant Eugene Houssiere claims title through mesne conveyances from C. C. Duson. The other defendant Joseph Leger was in possession as the tenant of Houssiere when the suit was filed.

C. C. Duson bought a half interest in the property from Theodore Baronet on the 22d of March, 1893; that is, after the plaintiffs' mother had died and her half interest in the community property had descended to her children. And on the same day Duson bought the other half interest in the property from Frank Quibodeaux, who, like Theodore Baronet, had bought from the heirs of Alexander R. Broussard.

Thereafter, that is, on the 24th of April, 1893, C. C. Duson, by notarial deed, bought, for \$750 cash, from 36 persons claiming to be the heirs of Charles Bourque, "all their rights, title and interest as heirs of Charles Bourque, deceased, in and to a certain tract of land known as the Valery Bourque concession No. 1108, being section 38, T. 9 S., R. 1 W., and section 32, T. 9 S., R. 2 W., containing in all 640 acres, more or less, situated in the parish of Acadia."

Charles Bourque bought from Jean Baptiste Figurant, on the 22d of November, 1822, "a tract of 320 superficial arpents of land on Bayou Plaquemine Brulee, in said parish, bounded on the south, east and west by lands of the United States or public domain, and on the north by land of vendor, being part of the land acquired at the succession sale of Joseph Bourque, deceased, made by George King, judge of the said parish, in August, 1816." The deed was recorded in the office of the notary public before whom it was signed, but not in the office of the recorder of conveyances of the parish in which the land was situated.

The property was not included in the inventory of the estate of Charles Bourque,

whose succession was opened in 1841. There appeared, however, in the inventory of the estate of his widow, Celeste Hebert Bourque, whose succession was opened in 1843, a tract of land described as follows, which the defendants claim is the south half of the Valere Bourque concession B-1108, viz.: "Another tract of land situated on Bayou des Bourques, in the aforesaid parish, containing 392 arpents, more or less, bounded on all sides by the public domain." The land was appraised at 50 cents an acre. It was not sold in the probate proceedings, as far as the record discloses.

John Baptiste Figurant bought from the succession of Susanne Bourque, widow of Joseph Bourque, at a public sale made by George King, parish judge, on the 12th of August, 1816, "a tract of land situated on the Bayou Plaquemine Brulee in the aforesaid parish, bounded on both sides by public land, containing 640 superficial acres, and being the same on which the vacherie of the deceased was kept." The deed was not recorded in the recorder's office.

Susanne Bourque acquired from Vallert Bourque, a deed reciting that for and in consideration of the sum of \$1, to him in hand paid by Susanne Bourque, and for divers other considerations, the said Vallert Bourque thereby granted, bargained, sold and confirmed unto Susanne Bourque "all that certain tract or parcel of land situated in the said parish and lying on a gully of the Bayou Plaquemine Brulee and containing 640 American acres, together with all its buildings and appurtenances." The instrument bears date the 20th of August, 1811, and was recorded on that day in the conveyance records of St. Landry parish, which then embraced the land in question. The document was not signed by Susanne Bourque nor by any one for her. It bears the signature, Vre. Bourque, and purports to have been "signed in the presence of Geo. King, P. Judge," and two witnesses.

The defendant, in answer to this suit, dis-

vows and repudiates the title acquired by C. C. Duson from Theodore Baronet and Frank Quibodeaux on the 22d of March, 1893, and relies only upon the title emanating from the deed from Valere, or Vallert, Bourque to Susanne Bourque, dated the 20th of August, 1811; that is, the title acquired by Duson from the heirs of Charles Bourque on the 24th of April, 1893.

If the defendant depended upon the title acquired from the plaintiffs' father on the 22d of March, 1893, purporting to convey to him a half interest in the property, the plaintiffs would have title to the fourth interest claimed by them, provided the tax sale to Joseph J. Beauchamp, dated the 2d of October, 1871, was valid, because the plaintiffs' father had no authority to sell the fourth interest which they had inherited from their mother.

The defendant pleads that the tax sale to Beauchamp was null, on the grounds: (1) That the assessment and sale for taxes should have been made in the name of the owner of the property; (2) in the alternative, if the assessment and sale should not have been made in the name of the owner, then that they should have been made in the name of the estate of Valere Bourque, who had died in 1819 and whose succession was opened; and (3) that the tax sale was not preceded by any notice to the heirs of Valere Bourque, nor by any other formalities or requirements of law.

The plaintiffs plead that the defendant is estopped from disputing the validity of the title resulting from the tax sale to Beauchamp, because the defendant acquired three-fourths interest in that title by mesne conveyances from C. C. Duson, who had acquired, under the same tax title before he (Duson) purchased the counterclaims of the heirs of Charles Bourque, a half interest from Frank Quibodeaux and a fourth interest (by the deed purporting to convey a half interest) from Theodore Baronet.

The plaintiffs contend that the title to the



Valere Bourque concession really stood of record in his name at the time it was assessed and sold for taxes, and that the sale was therefore valid. In that connection, they contend that the instrument dated the 20th of August, 1811, purporting to convey title from Valiert Bourque (even assuming that the name was intended for Valere Bourque) was an attempted donation, under article 2464 of the Civil Code, the price, \$1, being out of proportion with the value of the property, and that the attempted donation was null because it was not accepted by the donee, as required for its validity by articles 1540, 1542-1544, of the Civil Code. They contend that the instrument did not contain a description sufficient to identify or convey any tract of land, and that it was therefore of no effect, even as a sale. They contend that there was not a sufficient description to identify or convey any tract of land, either in the sale from the succession of Susanne Bourque to Jean Baptiste Figurant or in the sale by him to Charles Bourque. They argue further that neither of the two sales last mentioned affected the right of the assessor to assess the land in the name of its original owner, because the deeds were not recorded in the conveyance records of the parish in which the land was situated.

The plaintiffs also plead the prescription of three years, under article 233 of the Constitution, against the defendant's demand to have the tax sale set aside for any other cause than that of dual assessment or of previous payment of the taxes.

It is well settled that the prescription of three years, under article 233 of the Constitution, cures the invalidity of a sale for taxes assessed in the name of one who did not own the property or who had died before the sale was made.

The defendant contends that the operation of prescription was suspended by the fact that C. C. Duson took possession of the

property when he bought it in 1893 and retained possession continuously longer than three years after the adoption of the Constitution of 1898, and that his possession was transferred to each succeeding vendee from him, including the defendant, and has continued to this day. The defendant relies upon the doctrine of the decision in *Carey v. Cagney*, 109 La. 77, 33 South. 89, and in several later cases, that, if the owner of property sold for taxes remains in actual possession of it, his possession is in continuous conflict with, and is a continuous protest against, the claim arising from the tax sale, and prescription cannot operate as a statute of repose in favor of the holder of the tax title under such circumstances.

The plaintiffs reply that the doctrine of the decision in *Carey v. Cagney* does not apply to this case, because the only parties who had possession of the property from the date of the tax sale until Duson acquired it were the holders of the title resulting from the tax sale, which title and possession were delivered by them to Duson.

Each of the deeds by which Duson acquired an interest in the title resulting from the tax sale made to J. J. Beauchamp, that is, the deed from Theodore Baronet to Duson and the deed from Frank Quibodeaux to Duson, contains the recital that the vendor warranted only such title as J. J. Beauchamp had acquired by virtue of the sale made to him by the tax collector in 1871 "and of other sales made by the said Beauchamp to the author of the said purchaser in the year 18—." The word "purchaser" evidently refers to Frank Quibodeaux in the one sale and to Theodore Baronet in the other, because they were the purchasers from the heirs of Alexander R. Broussard, to whom Beauchamp had sold the property. Be that as it may, Duson expressed his recognition of the fact that he acquired only the title that had been acquired by Beauchamp by vir-

tue of the sale for taxes assessed to Valere Bourque. It is true that Duson afterwards, perhaps before taking possession of the land, purchased the counterclaim of the heirs of Charles Bourque. But he did not, at any time, repudiate or disavow the tax title that he had acquired from the plaintiffs' father and from Quibodeaux; nor did any one who acquired title from Duson repudiate his tax title, until the defendant repudiated and disavowed it in answer to this suit. Under those circumstances, it cannot be said that Duson took or ever held possession in opposition to the tax title, or that any one claiming from him ever held such adverse possession, before the defendant answered this suit.

The land was open, not cultivated nor occupied by any one, at the time of the tax sale and for many years previous thereto. It was never occupied or used in any way by Charles Bourque or his heirs after the tax sale. Alexander R. Broussard took actual possession of the property in 1885, soon after he had bought it from Beauchamp, the purchaser at the tax sale, and Broussard remained in possession until his death. He died on the property in 1890, and his heirs remained in possession of the land until they sold it to the plaintiffs' father and Frank Quibodeaux. They, in turn, took actual possession from the heirs of Broussard, and retained it until they transferred it to Duson.

The doctrine of the decision in *Carey v. Cagney*, which the defendant invokes in opposition to the plaintiffs' plea of prescription, has no application to this case, because the possession of Duson was not in conflict with, or a protest against, the title arising from the tax sale. On the contrary, Duson

acquired and held possession by virtue of the tax title, and his transferees, including the defendant, held possession by the same title and authority, until the latter repudiated that title in answer to this suit.

Our conclusion is that the defendant's demand to have the tax sale set aside for the causes alleged is barred by the prescription of three years. As the defendant relies solely upon the alleged invalidity of the plaintiffs' tax title, and as the alleged invalidity is cured by the prescription of three years, the plaintiffs are entitled to judgment recognizing their ownership of a fourth interest in the property.

As the district judge, having concluded that the plaintiffs had no interest in the land, had no occasion to consider their demand for a partition, for a fourth of the rents and revenues, or the defendant's counterclaim for improvements and for taxes paid, or his demands in warranty, it is necessary to remand the case to the district court for a trial and decision of the suit for a partition and of the incidental demands.

The judgment appealed from is annulled, and it is now ordered, adjudged and decreed that the plaintiffs be and they are hereby recognized as the owners of a fourth interest in the south half of the tract of land designated as section 38, in T. 9 S., R. 1 W., and section 32, in T. 9 S., R. 2 W., being the Valere Bourque concession B-1108. It is further ordered that this case be remanded to the district court for a trial and decision of the suit for partition, and all incidental demands. The defendant appellee is to pay the costs of this appeal; the costs of the district court are to be disposed of in the final judgment.

PROVOSTY, J., dissents.

(78 South. 245)

No. 21501.

O'REILLY v. IRWIN et al.

(Feb. 25, 1918. Rehearing Denied April 1, 1918.)

(Syllabus by the Court.)

1. TRIAL ~~§~~105(2)—SIGNATURE—EVIDENCE.

Whatever may be the proper interpretation of Code Prac. art. 325, when construed with Civ. Code, art. 2245, testimony, admitted without objection and tending to overcome the defense that the signature to an instrument sued on has been forged, is entitled to be considered as in any other case where an acknowledgment is relied on.

(Additional Syllabus by Editorial Staff.)

2. PRINCIPAL AND SURETY ~~§~~161—FORGERY OF SIGNATURES—BURDEN OF PROOF—EVIDENCE.

In an action against defendants in solido upon a bond, plaintiff's evidence held to sustain the burden of overcoming defendants' denial of their signatures.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Mrs. Mary Flynn Hooth, wife of Peter J. O'Reilly, against Edwin Irwin, Jr., and Michael Irwin. Judgment for plaintiff, against defendants in solido, and they appeal. Affirmed.

McCloskey & Benedict, of New Orleans, for appellants. Dufour & Janvier and Charles I. Denechaud, all of New Orleans, for appellee.

MONROE, C. J. Plaintiff obtained judgment against the two above-named defendants, in solido, for \$5,200, with interest, less \$600, upon a bond alleged to have been given by them; the defense being that the signatures were forged. The instrument sued on contains a recital to the effect that James J. Woulfe, a notary, had invested the money of plaintiff in two notes of John Wells, each for \$800, two notes of Mrs. Kate Regan Gardner, each for \$1,050, two notes of John Espanos, each for \$600, and two, each for \$1,200; the condition of the obligation being that Woulfe, as principal, should assure the collection of

the notes, all of which were then past-due, prior to January 1, 1914, and the instrument bearing date July 23, 1912. There was subsequently added the following, purporting also to be signed by Woulfe and the defendants to wit:

"Further description for further identification of the notes afore described herein, said two notes of John Wells being made payable respectively at one and two years after date, each for \$800, and paraphed 'Ne varietur,' by James J. Woulfe, notary, in identification with act passed before him on June 2, 1910; and said two notes of Mrs. Kate Regan Gardner, each for the sum of \$1,050, being made payable, respectively, at one and two years after date and paraphed 'Ne varietur,' by James J. Woulfe, notary, in identification with act passed before him on August 9, 1909. This additional description being herein made with our approval and acknowledgment as forms part of said bond."

Mr. Charles Denechaud, a member of the bar of high standing, testified that the original instrument, together with the notes therein mentioned were placed in his hands by the plaintiffs; that in looking over the bond he found that the Wells and Regan (Gardner) notes were inadequately described, and called Mr. Woulfe's attention to it; that Woulfe thereafter came to his office with the additional description written upon the bond and the signatures attached thereto, and "with him was Mr. Irwin"; and further as follows:

"Q. Which Mr. Irwin? A. The one sitting immediately to the right of Mr. McCloskey; I don't know his name. Q. Mr. Ed Irwin? A. Mr. Ed Irwin; he is the one [who] came to my office with Mr. Woulfe, and I asked him, in the presence of Mr. Woulfe, if he and his brother had signed this, and he told me 'Yes'; and I asked him if he and his brother had signed the signatures above, on the bond, and he told me 'Yes.' \* \* \* Q. And he saw the document? A. Oh, yes; the document was opened by me, immediately, and exhibited to him and to Mrs. Woulfe. \* \* \* Q. Did you see Michael Irwin? \* \* \* A. If that is Michael Irwin, with the glasses, he was not there. Q. Did you ever see him before? A. Oh, I have seen these two gentlemen for years."

Being asked whether anything had been paid on account of the notes, prior to the institution of the suit, he replied that the

two Regan notes of \$1,050 each had been paid, and \$600 on the Asperus (Espanos) notes.

Edward Irwin, Jr., gives the following, with other, testimony:

"Q. Mr. Irwin, Mr. Denechaud, in whom I have every confidence, has testified that you called at his office and admitted those signatures? A. I have no recollection of ever being in Mr. Denechaud's office. Q. Mr. Irwin, might you not be mistaken about that? A. I am positive, Mr. McCloskey, I never remember being in Mr. Denechaud's office. Whereabouts is your office, Mr. Denechaud?"

Mr. Denechaud: "A. You know."

Mr. McCloskey: "Q. You don't know where his office is? A. I don't honestly."

#### Cross-examination:

"Q. You say, you have no recollection of going to Mr. Denechaud's office? A. No, sir; I have not. Q. Are you prepared to swear that you never went to Mr. Denechaud's office? A. With Mr. Woulfe? Q. Yes. A. Well, I could not exactly swear to that, but I am almost sure I never went to Mr. Denechaud's office with Mr. Woulfe. Q. Are you prepared to swear that you never went into Mr. Denechaud's office? A. No; I could not swear to that."

Mr. Denechaud, being recalled, testified further as follows:

"Q. You say, you saw him in your office; did you ever see him before? A. Oh, yes; I have known him all my life. He and his brother are always around the cigar store at the corner of Gravier and St. Charles—spend a good deal of time there. Q. Mr. Woulfe could not have brought any one else there? A. No, sir; I am just as positive about this as any testimony I have ever given, that the man who left the stand was in my office with James J. Woulfe. I could not be mistaken. Q. And still you don't know his name? A. He is the same; no, sir; I don't know his name, but this is the man. There are three Irwins. There is a third Irwin in this courtroom, and I don't know his name. I don't know the name of the third one."

[1, 2] A number of notarial acts, executed by Mr. Woulfe in his capacity as notary and bearing the admitted signatures of the defendants as witnesses, were offered in evidence, and it was admitted by defendants

that they were on very friendly terms with Woulfe and had confidence in him at the time of the occurrence to which the foregoing testimony refers. Comparing the alleged signatures sued on with those attached to the acts thus mentioned, a well-known expert in handwriting testified, in quite positive terms, to the genuineness of the signatures sued on. The testimony of Mr. Denechaud that Mr. Edward Irwin, Jr., not only admitted his own signature but also stated that his brother had likewise signed the bond, was reiterated and went in without objection; and, whatever may be the proper interpretation of C. P. art. 325, as construed with C. C. art. 2245, we are of opinion that testimony showing the acknowledgment of an alleged forged signature, when admitted without objection, is to be given the effect to which it would be entitled in any other case, where an acknowledgment is relied on. *Chaffe v. Cupp*, 5 La. Ann. 684.

We have, therefore, as against the bare denial of the defendants, the testimony to the admission of the signatures by Edward Irwin, Jr., to the fact, which he was unable to deny, and made no attempt to explain, that he visited the office at which the admission is shown to have been made, in the company of Mr. Woulfe; that Woulfe had long been his friend and that he had signed many instruments at his request; and, finally, we have the testimony of the expert, strictly admissible under C. P. art. 325.

Upon the whole, we concur with the judge a quo in the view that plaintiff has successfully carried the burden resting upon her of overcoming defendant's denial of their signatures, and that she is entitled to an affirmation of the judgment that she obtained.

The judgment appealed from is therefore affirmed.

(78 South. 247)

No. 22542.

CLOGHER v. NEW ORLEANS RY. &  
LIGHT CO.

(Oct. 20, 1917. On Rehearing, April 1, 1918.)

*(Syllabus by the Court.)*1. CARRIERS  $\S$  303(11)—SETTING DOWN PAS-  
SENGERS—CARE REQUIRED.

A common carrier is bound to exercise the strictest diligence in setting down a passenger as safely, as the means of the conveyance employed and the circumstances of the case will permit, and that duty is the more incumbent upon it when the conveyance is stopped at an unusual and more or less dangerous place.

*(Additional Syllabus by Editorial Staff.)*

On Rehearing.

2. CARRIERS  $\S$  303(11)—SETTING DOWN PAS-  
SENGERS—CARE REQUIRED.

It is not negligence for a street car company to stop its car either short of or beyond the regular stopping place, although the place where the car is stopped is not precisely similar to that at the regular stopping place.

3. CARRIERS  $\S$  303(13)—SETTING DOWN PAS-  
SENGERS—NEGLIGENCE.

Where a street car stopped 15 or 20 feet beyond its usual stopping place at a place where the step of the car was 15½ or 16 inches above the roadway, so that a passenger might safely alight by extending his foot 7 inches out and stepping down while holding onto the handlebar, such place was reasonably safe, and carrier was not liable for injury to passenger while alighting.

Leche, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Mrs. Michael Clogher against the New Orleans Railway & Light Company. Judgment for plaintiff, and defendant appeals. Judgment set aside, and suit dismissed.

Dart, Kernan & Dart, of New Orleans, for appellant. Meyer S. Dreifus and Hebert W. Kaiser, both of New Orleans, for appellee.

LECHE, J. On July 9, 1915, shortly before the noon hour, plaintiff was a passenger on one of defendant's electric railway cars, going

out on Tulane avenue. After the car had crossed Miro street, and being then within one block of the intersection of Tonti street, where that street runs across Tulane avenue, plaintiff, gave the customary signal, indicating that she wished to alight at said corner, the nearest stopping place to her home on Tonti street.

Instead of stopping the car in such manner as to bring the rear step on a line with the sidewalk on the further side of Tonti street, according to the well-established custom of defendant in the operation of its cars, the motorman proceeded some 20 feet further, so that the rear step of the car, off which plaintiff had to alight, instead of being at the usual place where pedestrians cross the street, was some 20 feet further, over the neutral ground, where the car tracks are laid on Tulane avenue. The plaintiff, a lady 44 years of age, and weighing 175 pounds, with a small bundle in her hands, descended to the ground in the usual manner, when she missed her footing, fell, and suffered bodily injury. These are the facts, substantially, as alleged, in plaintiff's petition, as borne out by the testimony in the record and not controverted in this court.

The record further shows that at the street crossing, where the car should have been stopped, the car step would have been 14½ inches from the ground, which is level at that point; that the neutral ground, on which the tracks are laid rises gradually as it extends towards the center of the block, and that where the car actually was stopped, the car step was 11½ inches above the neutral ground; that there is a ledge of neutral ground extending approximately 7 inches beyond a line perpendicular to the outer edge of the step of the car; that this ledge of ground is supported by a rock or concrete curb 4½ inches higher than the pavement, so that the paved part of the street used for traffic was 16 inches lower than the car step, at the place where plaintiff alighted. To say exact-

ly how plaintiff came to her fall is more a matter of surmise than of direct proof, but the only reasonable deduction to be drawn from all the testimony in the case is that she rested the foot upon which she alighted to the ground on the edge of the curbing; the berm or ledge of the neutral ground being too narrow to place her foot inside of the curb and too wide to permit her to reach the pavement beyond the curb; that in turning she slipped and twisted her ankle, causing her to lose her balance, thereby bringing her body in violent contact with the pavement below.

This conformation of the surface of the street made it dangerous for a lady of the age and weight of plaintiff to alight at this particular place.

Defendant does not plead contributory negligence, a defense which should be specially pleaded (*Buechner v. City of New Orleans*, 112 La. 599, 36 South. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455, affirmed in *Robertson v. Jennings*, 128 La. 804, 55 South. 375), but it alleges that the car was stopped at the usual place, at the street crossing, and that plaintiff was hurt by her own awkwardness. This defense is not supported by the evidence, was not urged in argument, and was virtually abandoned on appeal.

[1] The law as recognized in decisions of this court is that a carrier of passengers should exercise the strictest diligence in receiving a passenger, conveying him to his destination and setting him down as safely as the means of the conveyance employed and the circumstances of the case will permit. *Le Blanc v. Sweet*, 107 La. 355, 55 South. 672; *Guldry v. M. L. & T. R. & S. S. Co.*, 140 La. 1008, 74 South. 534, L. R. A. 1917D, 962. Our conclusion then is that plaintiff was deposited at an unusual and more or less dangerous place, and that defendant failed to carry out its duty of safely setting plaintiff down from its car.

The quantum of damages is not contested in this court.

The judgment appealed from is affirmed.

#### On Rehearing.

PROVOSTY, J. Plaintiff, a lady 44 years old, and weighing 175 pounds, fell while alighting from one of the electric street cars of the defendant company on Tulane avenue, and sues in damages.

The avenue consists of two asphalted roadways, with an unpaved neutral ground between them upon which the cars run. The surface of the roadway of the cross streets which traverse it, or in other words, the surface of its own roadway at the cross street intersections, is level with the neutral ground and with the top of the rails. It lowers gradually, though only slightly, in the direction of the middle of the block, while the neutral ground maintains its level. Plaintiff says that this difference in elevation between the asphalted roadway and the neutral ground does not exist at the regular stopping place for the cars, which is where the sidewalk of the cross street would pass if prolonged across the avenue; that at that place the neutral ground is level with the roadway; and she charges as negligence on the part of the defendant company that, for letting her get off, the car did not stop at this regular stopping place, but some 15 or 20 feet beyond. The neutral ground is of uniform width, and the outer edge of its curb is only 7 inches from the outer edge of the step of the car. Plaintiff attributes her fall to her having inadvertently, in descending from the car, laid her foot upon the outer edge of the curb of the neutral ground, and thus obtained an insecure foothold.

This alleged difference between the footing at the regular stopping place and at the place where the car stopped is the fundamental fact in plaintiff's case, and therefore the burden rested upon her to establish it to a

legal certainty. Whether she has done so is left doubtful by the evidence. But as perhaps she had no reason to suppose it would be seriously contested, we prefer to rest our decision upon the broader ground, that the place where the car stopped was reasonably safe for the alighting of a passenger, and that consequently the stopping there was not negligence.

[2] Were plaintiff to succeed, the doctrine of the case would have to be that, for a street car company to stop its car either short of, or beyond, the regular stopping place is negligence, unless the footing at the place where the car is stopped happens to be precisely similar to that at the regular stopping place. The practical operation of such a rule would be to necessitate the marking of the space constituting the regular stopping place, and to preclude the stopping elsewhere, unless the car company choose voluntarily to incur the risk of a lawsuit. A tardy signal for stopping would have to pass unheeded, with the consequence that many a passenger would be carried beyond his station. On days of rain and slippery tracks the car would have to approach a stopping place gingerly, with bated breath, as it were, lest it be not precise in making the stop. Perhaps such a rule would suit the car company, but certainly not the traveling public.

As a matter of fact, in New Orleans many cross streets do not traverse the car tracks at right angles. In all such cases the question of where was the proper place to stop would arise. Even in the present case the conductor and the motorman and another witness testify that the car made what they considered to be a perfect stop; that is to say, stopped at the proper place.

[3] At the place where the car stopped, the step of the car was 15½ or 16 inches above the roadway, accordingly as the stop was made 15 or 20 feet from the regular stopping place; and hence all plaintiff would have had to do for safely alighting would

have been to extend her foot seven inches out and step down 15½ or 16 inches while holding on to a handlebar. We think such a place was reasonably safe, and that if plaintiff had been mindful of her step she would not have fallen. The conductor stood on the platform, and a gentleman friend of hers stood on the roadway at the car step, to afford her assistance if needed. We suspect the true cause of plaintiff's misadventure was that she was more mindful of the conversation, or attention, of this friend than of where she trod. At the regular stopping place plaintiff would have had to descend from practically the same height, 14½ inches.

Plaintiff's learned counsel cite a case where the car had stopped opposite "a deep gully," and another case where "the rails were on an artificial embankment 2 or more feet above the natural surface, and extending 12 or 15 inches from the rail," but evidently between situations like that and the situation in the present case, where the neutral ground was but 4 or 5 inches higher than the level asphalted surface of the street, there is no analogy.

Judgment set aside, and suit dismissed, at plaintiff's cost.

LECHE, J., dissents.

(78 South. 249)

No. 21376.

LOUISIANA SOC. FOR PREVENTION OF CRUELTY TO CHILDREN v. BOARD OF LEVEE COM'RS OF ORLEANS LEVEE DIST.

(June 11, 1917. On Rehearing, April 1, 1918.)

(Syllabus by the Court.)

On Rehearing.

1. LEVEES §—19—APPROPRIATION OF PROPERTY—REMEDY OF OWNER—CONSTITUTION.

Under article 312 of the Constitution, a person, part of whose property, consisting of a single unit within the Orleans levee district, is appropriated for levee purposes, has a right of action against the board of commissioners for

the recovery of its value, to be ascertained by deducting from the value of the entire property, as it stood prior to the appropriation, the value of the remainder, as it stands since the appropriation.

**2. LEVEES  $\S$  19—APPROPRIATION OF PROPERTY—REMEDY OF OWNER—ASCERTAINMENT OF VALUE—CONSTITUTION.**

Where, say, one-half of improved property consisting of a definite unit is appropriated under article 312 of the Constitution, it would be as inconsistent with the right to recover its value, conferred by that article, to hold that it is to be ascertained merely by dividing the aggregate market value per square foot of the entire tract as unimproved land, and attributing the quotient to the half appropriated, as it would be to apply that process to the ascertainment of the value of one half of an oil painting, severed from the other half, and so appropriated, or of a single building, or of a collection of buildings constituting an industrial plant. The principal value of the half of a thing consists in its serving as the complement of, and thereby giving value to, and receiving it from, the other half.

**3. LEVEES  $\S$  19—APPROPRIATION OF PROPERTY—REMEDY OF OWNER—CONSTITUTION.**

Inasmuch as the grant contained in article 312 of the Constitution is exceptional in character, goes no further than to confer a right of action to recover the value of property appropriated for levee purposes in a particular district, and differs from article 167, in that the latter requires the payment of damages, as well as value (in cases of expropriation), there can be no recovery of damages, as such, under that grant, but the causes thereof may, and must, necessarily, be considered in determining the value of the unappropriated property which is to be deducted from the value of the whole, in order to fix the value of that which is appropriated.

Provosty and Sommerville, JJ., dissenting.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Suit by the Louisiana Society for the Prevention of Cruelty to Children against the Board of Levee Commissioners of the Orleans Levee District. From the judgment, defendant appeals. Annulled, and case remanded to trial court for further proceedings.

James Wilkinson, of New Orleans, for appellant. James J. McLoughlin, F. S. Weis, E. M. Stafford, Wm. H. Byrnes, Jr., and Charles I. Denechaud, all of New Orleans, for appellee. I. D. Moore, City Atty., and J. F.

C. Waldo, Asst. City Atty., both of New Orleans, for Orleans Parish School Board, amici curiæ.

PROVOSTY, J. Along the banks of the Mississippi river in the state of Louisiana earth embankments, or levees, are built for holding in the river when in times of freshet it rises above the general level of the country. There is such a levee in front of the plaintiff's property in the city of New Orleans. It is some 20 feet high, as we gather, and has a 50-foot crown and a slope on the land side of 8 to 1—8 feet horizontal to 1 perpendicular. The banks of the river are not stable; on the lower side of bends, where the current strikes, they cave, or are eroded and washed away, so that the levee has occasionally to be moved back, when dangerously close to the river bank. When it is thus moved back the space required for its new location and for the public road which usually runs along the base of the levee on the land side is taken without the necessity of an expropriation and without compensation—by right of public servitudes of levee and road which all lands fronting on rivers owe in Louisiana. *Ruch v. City of New Orleans*, 43 La. Ann. 275, 9 South. 473; *Pontchartrain, etc., v. Board*, 49 La. Ann. 570, 21 South. 765. This servitude of levee was, however modified by the Constitution of 1898, our present Constitution, by the adoption of the following provision:

"Art. 312. Any person whose property has been appropriated within twelve months prior to the adoption of this Constitution, or whose property may hereafter be appropriated by the Orleans levee board for levee purposes, shall have a right in action against said board in any court of competent jurisdiction for the value of said property, and whatever judgments may be finally rendered against the board shall be paid out of the taxes collected by it in the same manner as other disbursements are made: Provided, that this shall not apply to batture property, nor to vacant property, where only a part thereof has been taken for levee purposes, and where the effect of the levee building would be to protect the remaining part of the same prop-



erty; nor to any property on any part of the river front, the administration and control of which is vested, for the purposes of commerce, either in the state or city authorities, and on which improvements have been erected under grants from the city of New Orleans, or other authority, nor to the said improvement: Provided, that said board shall have power to appropriate property subject to such servitude, for levee building, as under existing laws, without making such compensation in advance."

The levee in front of plaintiff's property has been moved back, and plaintiff has brought this suit under this constitutional provision.

Plaintiff's property is situated on the outskirts of the city, in a neighborhood where the streets, although platted, are not all opened, and are not cared for by the city. Whether the water, sewerage, and drainage systems of the city extend that far, the record does not show. It has a frontage of 325 feet on the river by a depth of 319 feet, and is bounded on one side by Jourdan avenue and on the other side by the land of the Ursuline Convent. Before the levee was moved back, there was a road and a banquette between the front yard and levee. Now the levee passes about 5 feet from the front porch of the main building, cutting off about half of the area of the property, including all of the front yard. The property was acquired by plaintiff in 1905, and was being used as a home for homeless children whom plaintiff took charge of, and as a sort of reformatory for culprit children sent there by the courts. The work was philanthropic; but the city contributed to the expenses. When the fact that the levee was to be moved back became known, plaintiff decided to abandon that location and locate elsewhere. But this was, as we gather, because plaintiff was under the impression that the defendant board would take and pay for the entire property. Plaintiff has discontinued that part of its work consisting in providing a home, and has turned over the premises to the city; not, however, because of the levee having been

constructed, but for the reason that the city's contribution towards the expenses of the work was considered insufficient.

Plaintiff's demand is for a lump sum of \$75,000, for the entire property, on the theory that the entire property has been appropriated, and that it is worth at least that much. The argument is that the part which remains is no longer suitable for the purposes for which it has heretofore been used; it being now too small in area for those purposes, and unsanitary, owing to dampness caused by the seepage water percolating through the levee and to the drainage water from the slope of the levee, and that, therefore, the whole property has been appropriated.

But, evidently, the whole has not been appropriated. Even if it were true that the part left was no longer suitable for plaintiff's purposes, the most that this could possibly show would be that the value of this remainder had been reduced.

The servitude which the defendant board is exercising entitles it to nothing more than sufficient space for the construction of the levee. It can take no more than this, for, if it did, it would be taking land not needed for levee purposes, and all it could do with it would be to sell it, and thus it would be converted from a levee board to a sort of dealer in real estate. It is utterly without authority to use for such a purpose the money realized from taxes imposed and collected for levee purposes solely, and confided to it to be used solely for levee purposes. In like manner, and for the same reason, it can appropriate only land; not any improvements that may happen to be on the land which it appropriates. On the other hand, while it cannot appropriate these improvements, it manifestly appropriates plaintiff's property to the extent that plaintiff is deprived of these improvements; that is, to the extent that plaintiff is damaged in having to remove

them, or in losing those which have no removable value. The basis of settlement as to the property which is actually taken must therefore be the market value of the property taken with the improvements upon it, less the removable value of the improvements.

On this market value the parties are very far from agreeing. Plaintiff would have it determined by the price at which the defendant board purchased the adjoining property from the Ursuline Convent and Lambou & Noel at private sale. Defendant on the other hand would have it fixed by the general market value of similarly situated land in that vicinity.

Defendant objected to proof of what was paid to the convent and to Lambou & Noel, on the ground that the price paid in expropriation proceedings, as the result either of a judgment or of an agreement of parties, is not a safe criterion, and is not admissible. In *La. Ry. & Nav. Co. v. Morere*, 116 La. 997, 41 South. 236, and in *La. Ry. & Nav. Co. v. Sarpy*, 117 La. 156, 41 South. 477, this court held that such evidence was admissible; that the objection to it should go only to its effect.

The evidence was admissible. But these two sales are of no great assistance for arriving at the value of plaintiff's property. The price paid per square foot is testified to, but there was \$58,000 worth of improvements on the convent property, and no evidence has been offered as to what was the number of feet, nor of what was the total price, except that one of the questions asked of Mayor Behrman by defendant's counsel is whether the defendant board did not pay interest to the convent on \$216,000. On the Lambou & Noel property there was a sawmill plant, with all necessary buildings, and until the loss resulting from the removal of this sawmill plant is ascertained and deducted, the price paid for the naked property cannot be any criterion. The improvements thus having to be removed were appraised at \$78,000,

and it took several months to make the appraisal, though, why so long, is not explained.

Father Racine testified that the convent property with the buildings upon it was worth 50 cents per square foot. But he was asked, "Did you ever hear of land down there being worth anything like that figure at private sale?" and he answered, "I don't know."

Mayor Behrman testified that the land of plaintiff was of the same character as that of the convent and of Lambou & Noel, and that he thought the price paid to those parties per square foot would be a fair one to be paid to plaintiff; but, evidently, he meant by this no more than that the three tracts were similar in character, and that what the levee board paid to these other parties it would be fair that it should pay to plaintiff. He does not mean to imply that he knows anything about the market value of property in that neighborhood, for he frankly disclaims having such knowledge. He was asked whether the defendant levee board, as at present composed, had not purchased similarly situated property just below, from the Abattoir Company, at 22 cents per square foot, after full investigation of the value of property in that neighborhood had been made by Messrs. John Dymond and E. H. Farrar, the attorneys of the Abattoir Company, and answered that it was so if the record so showed; and he was told that the record did so show. He testified also to the fact that the defendant board, as composed when the purchase from the convent was made, had purchased from Mr. Lambou, just prior to this purchase from the convent, two lots for \$20,000, which had cost Lambou \$1,400, and another lot from Chief of Police O'Connor for \$8,353, which some months previously had been acquired by O'Connor for \$1,200.

Mr. Onorato, the real estate agent, testified that he was familiar with the property of that neighborhood, and that the three

tracts of plaintiff, the convent, and Lambou & Noel were of similar character so far as the land was concerned, and were of equal value per square foot, and that in his opinion the land in that section is worth as much as was paid by the defendant board to Lambou & Noel. On cross-examination Mr. Onorato stated that there was an "undisputable absence of industries along that entire front," meaning thereby that the property was being utilized only for residential purposes. And to the question, "Is it not a fact that the property down there is about as dead as Hector's ghost?" he answered, "It has not been very active." And to the question, "Is it not a fact that on a caving bank no sane man would establish an industry or property that was liable to go into the river, where a new levee was necessary?" he answered:

"That is reasonable to assume. Q. Is it not a fact that that seriously affects the value of property? A. Well caving banks would naturally affect demands, unless there was some way of making conditions better. Q. Well, what would cause a man with sober, common sense to put any improvements on property that is liable to go into the river? A. I would not think so."

The witness was further cross-examined as follows:

"Q. Mr. Onorato, I understood you to say that you have had no personal dealings in that district? A. No, sir. The Court: Then, I think the objection is well taken. Mr. Wilkinson: Your honor does not understand my question. He may not have had personal dealings, but he might have knowledge of dealings of others, and I am asking the question, Did he have the slightest knowledge of any sale either by these, or anybody else, to his knowledge, wherein the purchase price was anything like the figure you say this property is worth? Mr. Weis: Such an answer would necessarily be predicated upon hearsay, and I don't see how he can ask the witness to answer a question that calls for a hearsay answer. The Court: I think the objection is well taken. The witness has stated that he had no personal dealings down there, and I don't see why he should be called upon to express an opinion as to the value of the property. Q. Your acquaintance with the value of property is gained not from any sales that you know of, but your imagination, is that the idea? A. No, from my common knowledge, I could not imagine the value

of property, Mr. Wilkinson; you have to know something about it. Q. And evidently you must, if you can state with any intelligence, and you have not made any such sale. A. I told you I have not made any such sale. Q. Do you know of any? A. Such sales, I know of plenty. Q. At such figures? A. I don't know the figures. Q. At a price of 50 cents per square foot? A. Well, the Ursuline Convent brought 70 cents per square foot. Q. \$1,800—did you say the Ursuline Convent sold at 70 cents per square foot? A. You are asking for information. Q. The Ursuline Convent, you are very much mistaken, it sold for 45 cents per square foot? The Court: I am going to stop this. If you are going to put this in evidence before the jury, offer them the sale— Mr. Wilkinson: I am trying to test the knowledge of this witness. The Court: Mr. Onorato says he does not know of any except by hearsay, and if you want to prove those sales, or similar dealings—that similar sales or certain dealings were made at certain prices— Mr. Wilkinson: I don't want to show that they were made at certain prices, but I want to show they were not made, and never have heard of such a sale, since the time the memory of men runneth not to the contrary."

We think that the widest latitude should have been allowed for testing the qualification of the witness to testify as to the value of property in that particular neighborhood, and that his not knowing of some 75 sales made in that neighborhood, especially if the sales were recent and in the immediate neighborhood, would have gone far towards showing that possibly Mr. Onorato, in expressing the opinion he did, was basing himself more on his general knowledge of property throughout the city than of land in the locality in question. And, in view of the acknowledgments made by him on his cross-examination, we are inclined to agree with our learned Brother that we "don't see why he should be called upon to express an opinion as to the value of the property."

The foregoing is the sum of plaintiff's evidence as to value. Plaintiff may be said to be relying almost exclusively upon the fact that a large price was paid by the levee board to the convent, and to Lambou & Noel. But what this price was for the land separate from the improvements upon it, we are un-

able to say from the record. And even if we could, these two transactions would not be conclusive, but would simply be evidence to be considered in connection with all the other evidence. The convent property was bought by the defendant board as formerly composed, not as presently composed; and one of the charges of the answer is that the price paid the convent by the former board was extravagant. And there is enough in the record to raise a suspicion that such was the case. For instance, Mr. Alfred Delavigne, witness for defendant, whose business is "abstracting titles to real estate," who once owned plaintiff's property, and all the property in that neighborhood, and had lived there for 78 years, and at the time of the appropriation of plaintiff's property was living on the property on the opposite side of Jourdan avenue from plaintiff's, and fronting on the river, testified as follows:

"Q. Then, Mr. Delavigne, what was the average market price of property in that section, irrespective of levee purchases at all, but upon the open market? A. Well, previous to the expropriation of the convent property, I have sold lots for \$300 to \$350, some of them fronting on the river side, and I thought I was doing well at the time. Q. That was about 10 cents per foot? A. About that. Q. But the purchase price of the Ursuline Convent property, you say, put property on the boom down there? A. Of course. Q. Nobody ever heard of such prices down there before? A. Never, and I thought even then, the price so paid was very unseemingly—I thought at one time we should be paid the same price, but I did not see how we could get it. Q. Now, as a matter of fact, did any private owner, or private transaction, either before or since that, equal the convent price? Mr. Wels: I object to that. This witness is not in a position to testify to that. Mr. Wilkinson: Q. That is to say, of your own knowledge, Mr. Delavigne, do you know of any private transaction, either before or since, of your own knowledge, that has ever equaled the prices that were paid for the convent property? A. I do not. Q. Do you know of any that have ever approximated, anywhere equaled it? A. No, sir. Q. And you were living down there at the time of the convent transaction? A. Yes, sir. Q. And lived there for 2 years after, did you not? A. Yes, sir."

For making room for the same levee this witness sold to defendant board his proper-

ty opposite plaintiff's on the opposite side of Jourdan avenue, and with the price acquired better property. The area of the property he sold was 19,000 feet, and he got for it \$6,000. The house on it was worth \$2,000. So that the price for the land was \$4,000. This would be at the rate of about 22 cents per square foot.

It also appears from the testimony of this witness that:

The average price paid by the defendant board to other parties in this neighborhood was \$675 and \$700 per lot. What was the area of these lots does not appear. "Q. Now, the prices that were paid, were they above the market value, or under the market value? A. You will have to qualify that. If we take the market value for the expropriation of the Ursuline Convent property, that property was worth the value, what it was paid for, but if you take the position, previous to the expropriation of the convent property, it was worth less."

Charles Roth, real estate agent, witness for defendant, testified that the part of the Lambou & Noel property which was not expropriated was left in his charge to be sold, and that although since the expropriation the City Belt Railroad had been built across the property, making it more valuable, he had been able to sell only 47,200 square feet of it, the price being 20 cents per square foot; that the piece he sold at this price fronts on the road or street along the levee.

Mr. Lloyd Posey, attorney, witness for defendant, testified that for the purpose of ascertaining what price the Abattoir Company should demand for its property when the defendant board was about to appropriate it, he, at the request of Mr. John Dymond, made an examination of all the purchases that had been made by the levee board for the last 2 years within 6 to 10 blocks on either side of the Abattoir property, and found the average price to have been "something over 23 cents per square foot." Mr. Posey's testimony leaves it doubtful whether he took into this computation the Lambou & Noel sale.

Mr. John Dymond testified that the price of

the sale by the Abattoir Company to the defendant board was 22 cents and a fraction, without the improvements, and 33 cents with the improvements, per square foot. He was then aware of the defendant board's purchase from Lambou & Noel. He also knew of the purchase from the convent; but he adds that the price paid to the nuns "was, in my opinion, something that I could not expect to get." He explains that he consented to accept this price only after having ascertained that it was the average price which the defendant board had been paying; but that the compelling reason for accepting it was that he was uncertain whether the defendant board was under the legal obligation to pay anything at all in view of the fact that only a small part of a large tract was being taken.

M. P. Dullut, witness for defendant, testified that he lives in the neighborhood in question, and that he sold front property to the defendant board along there, both vacant and improved; that the price for the vacant property was about 22 cents; that this was about 4 or 5 squares below Jourdan avenue; that there is "no substantial difference between property on the river front along there"—meaning, of course, the land, apart from improvements; that as soon as he became advised that his property would be appropriated by the defendant board he bought other property, several squares, to which he might move his improvements, and that the last he bought was at 28 cents per square foot. He says that he thinks the defendant board paid him a fair price for his property.

Dr. Martinez testified that his father's property was sold for 11 cents per square foot.

Mr. Wilkinson, counsel for defendant, and attorney for the defendant board and its agent for arriving at an amicable settlement with the property owners across whose properties the levee in question would have to pass, testified that it was he who as agent

for Dr. Martinez negotiated the sale of the Martinez property; that the price of the sale was 11 cents per square foot, and that this was the best price he could succeed in obtaining after a year's efforts; that the defendant board for that part of this property which it appropriated had paid Dr. Martinez 22 cents per square foot; and that this property was within 3 blocks of plaintiff's property.

The entire property, buildings and all, had cost \$10,000 in 1905, and the main building alone on it is appraised at \$15,000. Neither this main building nor any other is being expropriated. The evidence leaves it doubtful whether property had appreciated at all in that neighborhood, except that those fronting on the levee had been boomed by the price paid by the defendant levee board as formerly constituted to O'Connor, Lambou & Noel, and the convent, and the probability of the levee board paying at the same rate in the future for properties similarly situated.

Upon this evidence we conclude that 22 cents per square foot would be a liberal price for plaintiff's property, without the improvements.

No separate appraisements have been put upon the land with and without the improvements. These improvements consisted in a concrete block fence along the front, an iron fence along Jourdan avenue, a board fence on the convent side of the property, a board fence separating yard from garden, and a white marble eagle upon a pedestal, and a concrete walk. Plaintiff would add to this the filling which had been done in the past, and an iron pipe running from plaintiff's pump to the river.

This filling entered into the general value of the land itself. The marble eagle has been removed; we assume without loss, as no claim is being made for it. The iron pipe could, of course, be removed, and then, after

the levee was finished, be put back in position at but a trifling expense. The fences upon the property as a whole are appraised by Mr. Andry, the architect, at \$391 for the concrete block front fence, \$86 for the party fence, \$384 for the iron fence, and \$450 for "high fences painted." And the concrete paving upon the property as a whole is appraised by him at \$216. The front concrete block fence has had of course to be removed, and so much of the side fences as was on that part of the land which was appropriated. Only a small proportion of the concrete paving was upon this part of the land. About half of the iron fence was upon this land, and a little more than half of the party fence was upon it. There appears from the blueprints to have been a partition fence running from back to front between the front yard and the truck garden, but no appraisal is put upon this fence in the evidence, so far as we can discover. We assume that the concrete blocks composing the front fence would have retained approximately their original value. What would be the removable value of the party fence and of the partition fence, or of the materials composing them, we have no means whatever of ascertaining. The estimate made by Mr. Andry is of what would be the cost of installing such fences as these. Granting that the fences were as good as new, we could not assume that they had enhanced the value of the property to the full amount of their cost, and unless we do this, we are without data upon which to base a judgment. However, as plaintiff ought to be entitled to something, we will allow three-fourths of the value of these fences, say \$266.66, for the concrete fence, and three-fourths of one-half of the iron fence, say \$144, and three-fourths of one-half of the party fence, say \$32.31, and full appraisalment for one-third of the concrete pavement (practically guessing at this proportion of the concrete pavement from a glance at the blue-

prints), say one-third of \$216, equal; \$72. This allowance is thus being made subject to complaint from either side on application for rehearing.

Plaintiff is then entitled to judgment for 50,203 square feet at 22 cents, making \$11,044.66, plus \$514.97.

For injury to the remainder of the property, we do not think plaintiff can recover. Doubtless, in one sense, this remainder is taken or appropriated in so far as it is injured. Whoever injures my property takes it to that extent. And, doubtless, for several of the injuries for which plaintiff is claiming there would clearly be a right of recovery under the law of eminent domain requiring compensation to be made for the property taken or appropriated for a public purpose. But plaintiff is not suing under the law of eminent domain, but under a special article of the Constitution. Plaintiff's suit is not based upon any right inherent in plaintiff's ownership, but upon article 312 of the Constitution. Were it not for this article, plaintiff could claim no compensation, even for that part of the property actually taken, but would have to yield it without compensation, as an effect of the servitudes of levee and road to which riparian property is subject. The article of the Constitution having reference to a taking under the eminent domain power is article 167. It not only requires compensation to be made, but emphasizes the requirement by providing that it shall be "just and adequate"; and it requires compensation to be made not only for the property taken, but also for the property damaged. And it requires the compensation to be made in advance. Article 312 is very different in its language, and, indeed, may be said to bear in a sense upon an entirely different subject, or, in other words, to provide for an entirely different case.

The present Chief Justice and the writer of this opinion were members of the consti-

tutional convention which adopted this article, and were present at the debates. In fact, the present Chief Justice drafted the article. The dictating idea was that the immensely increased cost of constructing the levees, owing to their immensely increased size, had made it advisable, as a pure matter of economy, to locate the new levees at a much greater distance from the river than formerly in order that they might not have so soon to be moved back, and that the effect of this was to render this servitude of levee so burdensome that in common justice compensation ought to be made to the riparian proprietor or person whose property was being occupied by the new levee or put on the river side of it; that the levee was no longer as formerly a mere potato ridge along the edge of the river bank, which the front proprietor could, and was required to, put up at his own expense, but a great public work, the cost of which should not be made to fall with crushing weight upon the front proprietor, but be distributed over the entire area to be protected; that the making of such compensation was impossible in the country parishes, where sufficient funds could not be provided for such compensation in addition to what was imperatively required for the levee work proper, but was in a measure possible in the city of New Orleans, where larger values were being protected and ample means available.

It was fully realized, however, that this was imposing a tremendous burden upon the levee board, even in the parish of Orleans, and was placing in an exceptionally favored class front proprietors in that parish, and hence great caution was used in extending the favor. It was denied to vacant property of which only a part was taken; it was denied to property, the administration and control of which is vested for purposes of commerce in either the state or city authorities; and to privately owned property situated on

such publicly controlled property; compensation was not required to be made in advance, but only a right of action was given, and it was given only for the property appropriated, and not also, as by article 167, for property merely damaged. The continued existence of the levee servitude, except as this servitude was thus expressly modified, was expressly recognized.

There had been previous legislation on the same subject. Act 41, p. 46, of 1892, had required compensation to be made by the Orleans levee board for property "appropriated, damaged or destroyed." But by this same act, and by Act 25, p. 28, of 1894, the extent of this compensation was limited to the value at which the property was assessed for taxation.

And beginning with the case of Vicksburg, etc., R. Co. v. Calderwood, 15 La. Ann. 481, decided in 1860, the jurisprudence of this state had recognized a distinction between the taking or appropriating of property, and the damaging of that part of the property not taken. The court had there said:

"It is contended that the railroad, in addition to the value of the land taken for the public improvement, must pay for damages which may be occasioned to the rest of the property, without regard to the advantages derived from the public work. \* \* \* With what reason \* \* \* can the defendant demand damages for the inconvenience occasioned in the use of his property, when the same has been more than compensated by advantages, and his land has been rendered more valuable by the labor expended in the drainage, and by the facility with which his products may be taken to market?"

In N. O. Pac. R. Co. v. Gay, 31 La. Ann. 433, this court had said:

"The court in lieu of the desired charge instructed the jury that the damages beyond the value of the land taken 'could be offset by the enhanced value of the land not sought to be expropriated, although other lands in the vicinity might be equally enhanced in value by said road; that the jury had the right to set off such damages by the advantages and benefits to the owner derived from the projected railroad and the enhanced value of the property by reason of the public improvements.'"

In *Railroad Co. v. Dillard*, 35 La. Ann. 1045, the court had said:

"The Constitution enlarges and emphasizes the prohibition against taking private property for public use by specially including 'damaging' within the prohibition (article 156), and as this is an addition to the usual phraseology, it is said to denote the increased care and circumspection with which the organic law hedges this matter. \* \* \*"

In *N. O. Pac. R. Co. v. Murrell*, 34 La. Ann. 537, this court had said:

"They must assess the damages which the owner will sustain, in consequence of the work, in addition to the value of the property taken. \* \* \*

"But the advantages which the owner would derive from the work may be offset against these damages, the damage suffered being only the excess of injury over benefit."

In *Shreveport R. Co. v. Hinds*, 50 La. Ann. 782, this court, at page 785, 24 South. 287, 289, had said:

"The question of the value of the land to be taken is distinct and separate from the question of damages."

It is thus seen that at the time article 312 came to be drafted our jurisprudence had made a clear distinction between property actually taken and property not actually taken but merely damaged—holding the latter to be compensable by benefits, but the former, not. The article has, therefore, to be read in the light of this jurisprudence, and not in the light of subsequent decisions in which this distinction has not been so clearly recognized. In view of all the foregoing, we think that this right of action thus accorded *ex gratia* to the riparian owner for the value of the property appropriated must be strictly construed and restricted to the value of the property actually appropriated, leaving out damages to the part of the property not actually appropriated; that the same construction cannot be placed upon it as if the servitudes of levee and road had never existed and plaintiff were exercising a right of action growing out of the ownership, and not merely

one *ex gratia* limitatively accorded. The situation is not as if plaintiff were invoking article 167, requiring compensation to be made for property damaged.

The framers of article 312 were mindful, and plaintiff must be mindful, that the levee board, or the public it represents, does not take this property from choice for its own benefit or enrichment, but because the encroachments of the river upon the caving bank compels the taking, and that, therefore, these damages to the rest of the property are caused by the river, and are simply the consequence of the disadvantageous situation of plaintiff's property upon a caving bank; and, finally, that unless the levee was built, the entire property would be practically worthless.

For plaintiff's satisfaction we may add, however, that even if the damages in question were recoverable, they have not been established with sufficient certainty to justify the allowance.

One of the causes of damage is that plaintiff has had to put up a high board fence between the base of the levee and the main building, and that this fence cuts off the light from two of the schoolrooms on the lower floor. We can see no good reason why a wire netting or other kind of a nonlight-obstructing fence could not do just as well.

Another ground of complaint is about the seepage. But this seepage is only at such times as the water is up against the levee, and the evidence shows that there is less of it than formerly.

Another complaint is about the drainage from the slope of the levee. But whether the levee was there or not, the rainfall upon the area occupied by the levee would have to be drained off. It might not accumulate as it does now in the drainage ditch along the base of the levee; but if its presence there is injurious the remedy is to drain it off, and, if necessary, provide other means



against its causing dampness about the building. For the expense of providing these means of protection the plaintiff would have a cause of action if the case were one of ordinary expropriation, but the record is absolutely destitute of all evidence as to what the amount of this expense would be.

Another ground of complaint is that there is no longer any outlet for the property on the front. There is an outlet for pedestrians. The slope of the levee being 8 to 1, the surface allows of easy walking. If the property were deprived of all outlets, this might be said to amount to a taking of it, but it retains its side outlet on Jourdan avenue, so that the deprivation of the outlet on the front is more in the nature of an inconvenience or damage. Here again there would be a cause of action if the case were one of ordinary expropriation; but here again the lack of evidence as to what damage the property had suffered from that cause would make it impossible to give judgment for any particular amount.

In expressing the foregoing views, we do not lose sight of the fact that the appropriating of part of a property may, under certain peculiar circumstances, amount to a destruction of the value of the whole, so that compensation would have to be made for the whole. A striking instance of this would be where a house was cut in the middle. Another instance where the taking of a part would amount to something more than merely damaging the remainder would be where expenses had been incurred for adapting the property to a special purpose, and, as an effect of a part being taken, the remainder could no longer be used for said purpose, so that the increased value imparted by the incurring of the expenses would be wholly lost.

But a case of this kind would necessarily have to be highly exceptional to come within the intendment of said article 312; it would have to present the distinctive feature that

what was being taken was an indivisible entity, as, for instance, a house, or an industrial plant, or something of that kind. In addition to the property actually taken there would then have to be allowed compensation for the destruction of this entity. Plaintiff's property does not present this feature. Even if the complaints as to dampness and obstruction of lights and nonaccess on front street were irremediable, this would only mean a reduction in eligibility. As to area, there is left to plaintiff more than half an ordinary city block, and the work of plaintiff is being actually continued on the premises.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reduced to \$11,559.63, and that, as thus reduced, it be affirmed; plaintiff to pay the costs of this appeal.

SOMMERVILLE, J., takes no part.  
O'NEILL, J., concurs in the decree.

#### On Rehearing.

MONROE, C. J. Our reconsideration of this case having led to a change of opinion as to the interpretation of the law in which plaintiff's right to compensation is to be found, the following reasons for that change are assigned, to wit:

It will be conceded that the purpose for which this republican government was established was to secure those by whom it was established and their successors, in their rights of life, liberty, and property, and that, even though the Constitutions, federal and state, contained no special provisions upon the subject, it would, in a great measure, defeat that purpose if a citizen could be deprived of those rights without due process of law, and as to his property without just compensation. In order, however, that there should be no room for doubt, the Fifth and Fourteenth Amendments were added to the Constitution of the United States—the one,

confined in its application to the federal government, and declaring, *inter alia*, that no person shall be "deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation"; the other, reading in part, "nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws." And similar provisions have been incorporated in the Constitutions of probably all of the states. In the meanwhile the courts, having been called on to determine when property is to be considered "taken for public use," within the meaning of those amendments and provisions, reached different conclusions upon that subject, some of them holding that the expression applies only to tangible property actually taken; others, that it includes the impairment of any right, constituting an element of ownership in such property, though the thing itself be not taken. In some instances the state Constitutions have been amended by the addition of the words "or damaged" after the word "taken," and it has been held that under such amended provisions it is not necessary for the recovery of compensation that the damage shall be caused by an actual taking of, or trespass upon, the property, but that if the public use of the property which is taken is of such a character as to impair the owner's use and enjoyment of property not actually taken or trespassed on, he may recover.

In this state the Constitution of 1812 contained nothing more specific upon the subject of taking or damaging property for public purposes than the declaration in the Bill of Rights that the Constitution was ordained "in order to secure [to the citizens] the enjoyment of the right of life, liberty and property." In the Constitutions of 1845, 1852, 1864, and 1868 there are provisions to

the effect that "vested rights" shall not be divested, except for purposes of public utility, and for adequate compensation previously made (the word "previously" being omitted from the Constitution of 1868). To those provisions there are added in the Constitutions of 1879, 1898, and 1913, the articles 156 and 167, respectively, identical in terms, and reading:

"Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

Since 1855, however, the general statute law of Louisiana authorizing the expropriation of private property for public purposes has contained the provision (which appears to have been sometimes overlooked) that the juries in such cases "shall determine, after hearing the parties and their evidence, what is the value of the land described in the petition with its improvements, and what damages, if any, the owner would sustain, in addition to the loss of the land by its expropriation." R. S. 700, 1481; C. C. 2632; Acts 1855, p. 33, § 3.

On the other hand, it has long been settled by decisions of this court and of the Supreme Court of the United States that under our law riparian lands are burdened with a servitude in favor of the public, by reason whereof such portions of them as are necessary for the making or repairing of the levees which confine the waters of the streams upon which they border may be taken or damaged without compensation to the owner; the doctrine upon that subject being, that the state does not exercise the power of eminent domain by expropriating the property, but lawfully appropriates it to the use to which it is subjected by the title under which it is held, and hence that the private injury resulting therefrom is *damnum absque injuria*. C. C. 665; *Hanson v. Lafayette*, 18 La. 295; *Bourg v. Niles*, 6 La. Ann. 77; *Zenor v. Parish of Concordia*, 7 La.

Ann. 150; Dubose v. Commissioners, 11 La. Ann. 165; Bass v. State, 34 La. Ann. 494; Ruch v. City, 43 La. Ann. 275, 9 South. 473; Peart v. President of Levee Dist., 45 La. Ann. 421, 12 South. 490; Sauter v. Town of Vidalia, 110 La. 386, 387, 34 South. 558; Eldredge v. Trezevant, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490.

To the general rule thus established and recognized an exception has been provided, first by statute (Acts 41 of 1892, p. 46, and 25 of 1894, p. 28), then by the Constitution of 1898 (article 312), and again by statute (Acts 79 of 1898, p. 101, and 35 of 1902, p. 43) in favor of property owners in the Orleans levee district. The reasons for and terms of the exception appear in the preamble and body of the act of 1892, as follows, to wit:

"Whereas, it has become necessary to construct new levees in the sixth and seventh municipal districts of the city of New Orleans; and

"Whereas, the location and construction of these levees has been made under peculiar conditions which arise from the large number of small properties and tenements on the line of the said levees, which conditions do not usually exist.

\* \* \* \* \*

"Section 1. Be it enacted \* \* \* that the board of commissioners of the Orleans levee district be and is hereby authorized and directed to levy an additional special tax for the year 1892, not exceeding four-fifths of a mill on the dollar, \* \* \* for the purpose of indemnifying the owners of property in said Orleans levee district, appropriated, damaged or destroyed by said board in the construction of levees in said district; \* \* \* that, in no case shall the amount paid to such owners of the appropriated property exceed the assessed value thereof at the time of the appropriation."

The act of 1894 is confined in its application to the owners of the property situated in the sixth and seventh municipal districts.

[1] The new article that was incorporated in the Constitution of 1898 reads in part as follows:

"Art. 312. Any person whose property has been appropriated within twelve months prior to the adoption of this Constitution, or whose property may hereafter be appropriated by the Orleans levee board, for levee purposes, shall have a right in action against said board

\* \* \* for the value of said property." [Then follow exceptions in regard to bature, vacant land and certain other property, after which:] "Provided, that said board shall have power to appropriate property subject to such servitude, for levee building, as under existing laws, without making such compensation in advance."

The act of 1898, adopted after the Constitution went into effect, authorizes the levy of a special tax for that year "for the purpose of indemnifying the owners of the property in said Orleans levee district, appropriated, damaged or destroyed by said board," and contains the proviso:

"That no payment shall be made under the provisions of this act unless and until the property owner shall, in consideration thereof, sell, transfer and deliver to the city of New Orleans all his right, title and interest in and to the property so appropriated."

The act of 1902 purports to authorize the payment of claims for property appropriated, damaged, or destroyed out of the unexpended balance of the tax authorized by Act 79 of 1898, and is prefaced by a preamble which recites that many persons whose property was so dealt with had been compensated; that others, who are named, had received nothing; and that it would be inequitable not to compensate them. Therefore:

"Be it enacted \* \* \* that said parties hereinabove named and all others similarly situated do have a right of action against the Orleans levee board for the losses sustained by them on account of the damage, taking or destruction of their property for levee purposes during the years 1894 and 1895; and the amount of the claims established by them shall be payable out of the fund collected under Act 79 of 1898: Provided that not more than \$15,000.00 shall be set aside and made available for the payment of all claims under this act."

It is quite possible that the purpose of article 312 of the Constitution, in its original form, was to restrict the right of recovery to the bare value of the tangible property actually taken; but it is also quite possible that the original form was changed before the adoption of the proposed article, or it may be that the body of the convention placed an interpretation upon it not contemplated by its

authors, and yet admissible. The question to be here determined then is not what may have been the purpose of the framers of the article, but whether, as it now stands in the Constitution, it is reasonably susceptible of the interpretation that has been adopted by the General Assembly.

Interpreting the Fifth Amendment to the Constitution of the United States where it has been invoked in support of claims for consequential damages resulting from government work for the improvement of navigable streams, the Supreme Court of the United States has rested its rejection of such claims upon the two grounds, to wit, that the damages were the incidental consequences of the lawful and proper exercise of governmental power, and that riparian property is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the United States in that regard. There appears to be a single exception to the jurisprudence of the court upon the proposition first mentioned (*Pumpelly v. Canal Co.*, 13 Wall. [80 U. S.] 166, 20 L. Ed. 557); but, whether in the cases constituting the rule or the exception, the court has always, as it appears to us, rather emphasized the fact that the property with respect to which the damage was claimed constituted a different unit from, and formed no part of that which had been actually and physically taken.

In the *Pumpelly Case*, *supra*, the damage was caused by the building of a dam across an outlet of Winnebago Lake in Wisconsin under the authority of territorial and state legislation, as a result of which a distant tract of land was invaded by water, earth, and other material, and rendered useless to the owner. In deciding the case in favor of the plaintiff the court, through Mr. Justice Miller, said:

"We are not unaware of the numerous cases in the state court in which the doctrine has been successfully invoked that, for a consequential injury to the property of the individual,

arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application to many injuries to property so originating. \* \* \* But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that, where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy it or impair its usefulness, it is a taking, within the meaning of the Constitution," etc.

In the later case of *Northern Trans. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, it appeared that plaintiff owned land at the intersection of La Salle street and the Chicago river, upon which it had valuable dock and warehouse accommodations, at which many steamers made their landings, and that it was interrupted in the use of its property by the excavation, by authority of a state law, of a tunnel under the river, which necessitated the obstruction of the street, and by the building of a coffer dam in the river, which obstructed that stream; wherefore it sued the city for damages. It was, however, held that the injury complained of was *damnum absque injuria*; the court, through Mr. Justice Strong, saying (*inter alia*):

"But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in *Cooley on Constitutional Limitations*, p. 542, and notes. The extremist qualification of the doctrine is to be found \* \* \* in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U. S.) 166, 20 L. Ed. 557, and in *Eaton v. Railroad Co.*, 51 N. H. 504 [12 Am. Rep. 147]. In those cases it was held that the permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the

plaintiff's lot. All that was done was to render for a time its use more inconvenient."

In *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, it appeared that a lot owned by Taylor was damaged by reason of the construction, by authority of a city ordinance, of a viaduct in its immediate vicinity. The court said:

"For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coalyard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing, and selling coal. The premises were long so used and were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth street being greatly obstructed, and, at some points, practically cut off; and that, as a necessary result of this work, the use of Lumber street, as a way of approach to the coalyard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired."

The court found that the Constitution of Illinois, adopted in 1848, provided that no man's property should "be taken or applied to public use without just compensation being made to him," and that it had been held by the Supreme Court of that state in construing the provision that acts done in the proper exercise of governmental power and not directly encroaching upon private property, though their consequences might impair its use, were universally held not to be a taking within the meaning of such provision. It further found that the Constitution of 1870 contained the provision, "Private property shall not be taken or damaged for public use without just compensation," and that thereafter it became the settled doctrine of the Illinois court that:

"Any actual physical injury to private property by reason of the erection, construction or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted or its value substantially impaired, was

regarded as a taking of private property, within the meaning of the Constitution to the extent of the damages thereby occasioned," etc.

In *Gibson v. U. S.*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996, it appeared that plaintiff owned a tract of highly cultivated land devoted to truck farming, on Neville Island, in the Ohio river; that under the direction of the chief of engineers and Secretary of War, a dike was constructed in the river with a view of improving the navigation, but one of the effects of which was to obstruct the communication between the channel and plaintiff's landing during the greater part of the year, thereby reducing the value of the land from \$600 to \$150 or \$200 an acre. Among the facts found by the Court of Claims, from which the case was appealed, were the following:

"There was no water thrown back on plaintiff's land by the building of said dike, and said dike has not itself come into physical contact with claimant's land and has not been the cause of any such physical contact in any other way. In making the improvement the defendants did not recognize any right of property in the claimant, in and to the right alleged."

In affirming the judgment rejecting plaintiff's demand the court, through Chief Justice Fuller, said:

"The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, \* \* \* but the incidental consequence of the lawful and proper exercise of governmental power."

[2] In the case that we are now considering, the injury of which plaintiff complains is the direct result of the actual physical encroachment upon and appropriation of (say) one-half of a tract of land which (with its improvements), considered as a unit, appears to have been well adapted to the purpose for which it was being used, and (with or without the improvements) may have been desirable for other purposes, for which the remain-

ing half, left to the owner, would be wholly inadequate or unsuited. Article 312 of the Constitution gives plaintiff a right of action for the value of the property appropriated, and it would be as inconsistent with that grant to hold that such value can be ascertained merely by dividing the aggregate market value per square foot of the entire tract as it stood at the time of the appropriation, and attributing the quotient to the part which has been appropriated as it would be to apply that process to the ascertainment of the value of the one half of an oil painting, severed from the other half and so appropriated, or of a single building, or of a collection of buildings constituting an industrial plant. In almost any case that can be conceived the principal value of the half of a thing consists in its serving as the complement of, and thereby giving value to, and receiving it from, the other half. A building may be well worth \$10,000; cut it in half and that which remains may be worth no more than the cost of the wreckage, or practically nothing. The half which is taken while in place may therefore be worth \$10,000, not only to the owner, but in determining the value of the property as a whole for any purpose, and if the owner receives but \$5,000, he submits to a loss of \$5,000. The evidence shows that the building of the Ursulines was about 400 feet long, and the chaplain of the convent gives the following testimony as to what was done with it in the construction of the levee here in question, to wit:

"The building had to be cut in two, and one part of the building was on the levee side and the other on the other side of the levee, just like one might put up an immense house and cut it in two; now you take the parlor and dining room and run a levee, not only through the dining room, but the kitchen; you cut it in two, and they are not worth anything; you have the dining room in the front part and the kitchen was in the rear part, and we could not do anything with it."

[3] The Lambou & Noel Company owned a manufacturing plant consisting of a number

of buildings, assembled, presumably, with a view to economy of labor and power and general efficiency. The levee having been laid off and constructed solely with a view of protecting the public from the waters of the Mississippi river, the levee board took so much of that property as was needed for that purpose, but, in so doing, it also took part of an established plant and plant site, which had a value distinct from its value as mere land to be occupied by levee; and, we understand, the owners were compensated with reference to that condition. We therefore conclude that article 312 of the Constitution, in giving to an owner—one-half we will say, of a particular unit of whose property has been appropriated—a right of action for the recovery of its value, contemplates the recovery of the value of such half, when in place and serving as the complement of the other half, and hence that such value is to be ascertained by deducting from the value of the entire unit, as it stood prior to the appropriation, the value of the remaining half, as it stands since the appropriation. We further conclude that, inasmuch as the grant contained in the article in question is exceptional in character, goes no further than to confer a right of action to recover the value of the property taken for levee purposes in a particular district, and differs from article 167 in that the latter requires the payment of damages, as well as value, in cases of expropriation, the plaintiff herein is not entitled to recover consequential damages, as such, for inconvenience of ingress and egress, deprivation of light or view, impairment of use, etc., save in so far as those conditions may affect that portion of its property which remains, and the value of which, as it stands, is to be deducted from the value of the whole, as it stood before the appropriation. The case, not having been considered in the district court from the point of view thus stated, and testimony offered on behalf of both litigants, tending to show the value

of the property as a whole prior to, and of the remaining portion after, the appropriation, having been, as we think, improperly excluded, must be tried anew. It is therefore ordered that the judgment appealed from be annulled, and this case remanded to the trial court, to be there proceeded with according to law and to the views hereinabove expressed, the costs of the appeal to be borne by the litigants in equal proportions, and those of the trial court to await the final judgment.

PROVOSTY and SOMMERVILLE, JJ., dissent, for reasons assigned in original opinion, and in dissenting opinion of PROVOSTY, J. See 78 South. 259.

(78 South. 261)

No. 21180.

SANDLIN et ux. v. COYLE et al.

(Feb. 25, 1918. Rehearing Denied April 1, 1918.)

(Syllabus by Editorial Staff.)

On Motion to Dismiss Appeal.

1. COURTS  $\S$ 224(11)—APPELLATE JURISDICTION—AMOUNT INVOLVED.

Where plaintiff sought damages in the amount of \$2,950 and his wife subsequently intervened and demanded \$1,000 and adopted the allegations of her husband's petition and the demands of plaintiff and the intervener were rejected in one verdict and judgment, the amount involved was not below \$2,000, the lower jurisdiction of the Supreme Court, and the appeal will not be dismissed.

O'Niell, J., dissenting.

(Syllabus by the Court.)

On the Merits.

2. LANDLORD AND TENANT  $\S$ 173—DRIVING AWAY TENANT—DAMAGES.

Damages will be awarded to the owner of a plantation for an act of violence which results in driving a tenant, planting on shares, from his plantation.

(Additional Syllabus by Editorial Staff.)

3. LANDLORD AND TENANT  $\S$ 173—DRIVING AWAY TENANT—ACTION FOR DAMAGES—ESTOPPEL.

In action by owner of plantation for damages for acts of violence, resulting in driving

away a tenant planting on shares, plea of estoppel, based on owner's effort to dissuade defendants and his inviting them into his house, not showing consent to their unlawful purpose, was without merit.

4. DAMAGES  $\S$ 184, 192—DRIVING AWAY TENANT—EVIDENCE.

In such action, evidence held not to sustain a claim for damages for vexation and humiliation, or for damages suffered by plaintiff through illness of his wife.

5. DAMAGES  $\S$ 184—DRIVING AWAY TENANT—EVIDENCE.

In such action, wherein the wife of the owner intervened, evidence held not to support her claim for \$1,000 damages for shock, annoyance, sickness, and prolonged mental suffering.

Leche, J., dissenting.

Appeal from Second Judicial District Court, Parish of Webster; John N. Sandlin, Judge.

Action by S. B. Sandlin and Mrs. Annie Sandlin against R. M. Coyle and others. Judgment for defendants, and plaintiffs appeal. Motion to dismiss appeal denied, and judgment reversed in part and affirmed in part, and judgment rendered in favor of plaintiff S. B. Sandlin and against defendants in solido, and judgment against Mrs. Sandlin affirmed.

Roberts, Roberts & Johnson, of Minden, for appellants. W. R. Percy, of Shreveport, for appellees.

On Motion to Dismiss Appeal.

SOMMERVILLE, J. [1] Since the case was submitted, defendants have moved to dismiss the appeal herein on the ground that the amount claimed by plaintiff Sandlin is below the lower jurisdiction of the court.

The amount originally claimed by plaintiff was \$3,900 for injuries to him personally, and to him through injury to his wife.

On exception, the \$1,000 claimed by him for damages to him on account of injuries to Mrs. Sandlin was dismissed. The ruling was erroneous.

Mrs. Sandlin subsequently intervened in

the suit, and demanded \$1,000 from defendants; and she adopted the allegations made by her husband in his petition on account of damages to her. The demands of plaintiff and intervener were rejected in one verdict and judgment.

Mr. and Mrs. Sandlin both appealed.

In oral argument, in this court, counsel for plaintiff, Mr. Sandlin, abandoned the claim for \$950 for statutory damages. This abandonment reduced Sandlin's claim as originally made from \$3,900 to \$2,950.

Defendants argue that Sandlin's claim was further diminished by the \$1,000 which he originally claimed for injury by the defendants to Mrs. Sandlin, which resulted in further damage to him, and which claim was dismissed on exception. The judgment on the exception was embraced in the appeal taken by Sandlin from the final judgment in the case; and his claim for \$2,950 is before the court for adjudication.

In *La Groue v. New Orleans*, 114 La. 253, 38 South. 160, where Mrs. La Groue sued defendant for \$2,100 for personal injuries, and her husband joined in the same petition and asked for \$225 for damages to him arising from the injuries sustained by his wife, and there was judgment for plaintiffs, and Mr. La Groue moved to dismiss the appeal as to him, the motion to dismiss was denied. The court say:

"The demand of Melville La Groue is for \$225. founded, however, on the same cause of action as the demand of his wife for \$2,100, which, under Act 68, p. 95, of 1902 is her separate, individual property. In *Bowman et al. v. City of New Orleans*, 27 La. Ann. 501, the court held that where several plaintiffs united in one suit, for convenience and economy, against the city of New Orleans, for damages arising from one and the same cause, the total amount prayed for in the petition was the test of the jurisdiction of the Supreme Court. See, also, *Armstrong v. Railroad Co.*, 46 La. Ann. 1448, 16 South. 468. In *Clairain v. Telegraph Co.*, 40 La. Ann. 178, 3 South. 625, this court held that the claims of the widow and of the minor children for damages resulting from the death of the deceased were properly presented in a single suit, because arising from the same cause, citing *Riggs v. Bell*, 39 La. Ann. 1031, 3 South.

183, holding that, although defendants may have distinct defenses, they may be brought in together to defend the suit, 'where the causes have a cognate origin, and they have a common interest to be adjudicated upon.' In the latter case the court said:

"The law abhors a multiplicity of actions and favors the institution of suits against all defendants who may be liable for the same original cause, and who may have an interest to resist a plaintiff." 'Interest reipublicæ ut sit finis litium.'"

"For the same reasons, the joinder of plaintiffs is allowable under similar circumstances, and, where they join, the defendant should not be required to take a multiplicity of appeals. We consider that, as to the defendants herein, the amount in dispute is the total amount sued for."

The motion to dismiss is denied.

#### On the Merits.

[2] Plaintiff, a farmer engaged in planting on the share system, alleges that he had entered into a written contract with Frank Gilford, a colored tenant, to plant about 48 acres in cotton and corn during the year 1913; that defendants, eight in number, led by R. M. Coyle, of Cotton Valley, came upon his place for the purpose of taking Frank Gilford into custody, and to chastise and punish him for failing to pay R. M. Coyle \$50 which he owed him; that such unlawful and violent acts and threats by defendants caused Frank Gilford to abandon his contract and to flee for safety, taking his family with him, thus causing a loss to petitioner of \$950 actual damages; \$950 statutory damages, and \$1,000 for vexation, humiliation, and mortification, and \$1,000 for heavy expenses, worry, and uneasiness because of the prolonged spell of illness of his wife, caused by the said illegal acts of defendants.

Defendants excepted that under Act 54, 1906, p. 87, damages for interference with labor was limited to double the amount of debt due by the laborer, that plaintiff did not allege any debt to be due him by his tenant, and that the petition disclosed no cause of action.



This suit is an ordinary one for damages, and does not appear to have been brought under the statute referred to by defendants. The remedy given in the statute is not exclusive in its terms. It admits of another cause of action for damages under article 2316, C. C. Plaintiff's cause of action is not within the terms of the statute; the exception was properly overruled.

Mrs. Sandlin, wife of plaintiff, intervened and claimed \$1,000 damages for shock, annoyance, and worry resulting in a long spell of illness and mental and physical suffering, caused by the unlawful acts of defendants.

Defendants answered, denying the principal allegations of plaintiff's petition, and alleged that Frank Gilford had written R. M. Coyle an insolent letter, practically demanding an apology for some fancied injury, and hinting violence if it was not forthcoming. They admit that they went upon plaintiff's plantation on the day mentioned, and disclosed to him their desire to see Frank Gilford, and asked permission to see him; that they first sent a small delegation to plaintiff so as not to injure him or scare Frank Gilford. They allege that plaintiff consented to their request to see and speak to Frank Gilford, and they pleaded an estoppel, based on the alleged consent, to plaintiff's claim for damages.

There was trial by jury, and verdict and judgment for defendants. Plaintiffs have appealed.

Defendant Coyle testified:

"I went there (to plaintiff's plantation) to whip Frank Gilford, and to talk to Bartow Sandlin (plaintiff) about doing it, because he had written me an insulting letter." "To begin with Frank owed me a debt of \$50, or fifty some odd dollars, and I seen Frank in town up there at the Cotton Valley Drug Store, and I sent for him to come down, I wanted to see him." "We got up the crowd, and me and five men stopped before we got to Mr. Sandlin's place, and we sent these two other men over there to see Mr. Sandlin." "T. S. Young and Ernest Crawford." "The reason we sent them was because they were men that we didn't think the negro would suspicion, as neither were in the crowd before,

and they could talk with Mr. Sandlin and find out where the negro was, and we could make our arrangements to get a hold of the negro. \* \* \* Shortly after they went over there, Mr. Crawford came back. \* \* \* I went over to where Mr. Sandlin was, rode up, got down, talked to Mr. Sandlin, told him what my business was, and told him what we wanted to do. I said—I asked him where the negro was, and he said he had stepped off. 'Well,' I says, 'You have him to come back, and let us give him a thrashing, and put him back to work, and if he runs off, and you need any assistance in putting him back, let us know and we will put him back.' He said: 'No; I couldn't do it in the presence of my other hands; that would be against me in getting labor.' He said that he would rather they would not know that he knew anything about it. He then proposed for the crowd to come on in the house, and then ride off like we were going home; after dinner he would send this negro back there to work, and that he himself would ride over to his store. \* \* \* About a mile. So we rode off, and came back around the field next to McGee's on the railroad there, and laid down and waited until he ate dinner. He said he would have him back at 1 o'clock, and at 1 o'clock we rode back to his place, and hitched our horses to go back to where the hands were working. The two hands were there, but he wasn't there—we seen that the negro wasn't there; and we started up the road to where our horses were. Mr. Sandlin was in his yard, in sight of us, and as we were going up by the side of the fence, he hollowed at us, and we stopped. He came up, and he said: 'Boys, he got on to it that you-all had not gone, and I could not get him to come up here;' and I said: 'Well, we can get him some time;' and we stood and talked a little while, and I said: 'It would save us a whole lot of trouble if you would just let us have him this evening, as we are going to get him anyhow some time.' I believe I told him that we would not go into a white man's yard to get a negro, so we got on our horses, and went on home. The next time I saw Mr. Sandlin he was as friendly as ever, and I didn't know his feelings were hurt. While we were talking that morning, he said to me: 'He has only been here a few days, and rather than have you whip him before these negroes and me, I would rather let him go, because I can let him go without damage now.'"

Question by counsel for defendant: "Mr. Coyle, what statement, if any, did Mr. Sandlin make to your mob, or committee, or whatever it was, that went down there, about taking dinner with him, etc.?"

Answer: "When we left—went to leave—he says: 'If you-all have got a cook in the crowd, let's go put the horses up and feed them and go and have dinner. My wife is at school. That leaves no cook for me, and I am no cook. You are all welcome. We have plenty to cook, if you all will cook it.'"

Question: "That was on the second trip?"

Answer: "First trip. We thanked him, but

said we would go home, bid him good-bye, and rode off and left him, and were feeling good over the shape we had the thing in to get the negro. We were figuring on him sending the negro out to work and him going back to the store."

Question: "What would have happened to Frank if Mr. Sandlin had not been out there with him that morning?"

Answer: "Well, they would have got hold of him, and they would have whipped him real good, give him a good whipping."

The tenant, Frank Gilford, testified on the trial that he saw defendants on their visit to Mr. Sandlin's place, and knew that they were demanding that he be delivered to them; that he left to save his life, and went to Arkansas to live. He testified that he heard Mr. Crawford ask Mr. Sandlin if he (Frank Gilford) was there, and that he then left. Crawford Dillon, another tenant on plaintiff's place, who was with plaintiff and Frank Gilford, when Mr. Crawford and Mr. Young, two of the defendants, rode up, testified; and he supports Frank Gilford's testimony to the effect that he heard Mr. Crawford say that they had come after Frank Gilford.

It was repeatedly admitted by the defendants on the stand that they had gone to plaintiff's place to whip one of his tenants for a grievance that R. M. Coyle had against that tenant, with the effect of driving the tenant off of the plantation and out of the state thus causing plaintiff loss and damage.

The method adopted by defendants to settle an individual dispute between Mr. Coyle and Frank Gilford was a violent and unlawful act on their part.

In this state laws have been passed and courts have been established that individual disputes might be settled without resorting to violence. And when defendants violated the law, invaded plaintiff's property, unlawfully sought to injure plaintiff's tenant, drove him off the place, and damaged plaintiff, they must repair that damage. *Cooper v. Cappel*, 29 La. Ann. 213; *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132; *Ker-*

*nan v. Humble*, 51 La. Ann. 389, 25 South. 431.

Plaintiff tried in vain to get another tenant to take Frank Gilford's place, but failed. He lost his one-half of the crop which Frank Gilford would have made during the year 1913.

That year was favorable to cotton planting, and it was reasonable to have expected Frank Gilford and his two helpers to have grown and gathered as much cotton and corn as others did in the immediate neighborhood.

Plaintiff testified that he leased to Frank Gilford 32 acres to be planted in cotton and 8 acres to be planted in corn; that the yield was in the neighborhood of 967 pounds of seed cotton, and 40 bushels of corn per acre; that lint cotton averaged between 11 and 12 cents per pound. He did not testify to the value of corn. The one-half of the cotton, which would have been plaintiff's share, was 5,157 pounds; at 11½ cents per pound, it would have brought \$593.05. He is entitled to judgment therefor.

[3] The plea of estoppel should have been overruled. Defendants invaded plaintiff's plantation without his knowledge or consent, and for an unlawful purpose. After they were there plaintiff sought to dissuade them from their purpose, and invited them into his house. He may have told them to go for a short distance, so as to give Frank Gilford an opportunity to save himself from assault. But the evidence does not show that the plaintiff consented that defendants might come upon his plantation for an unlawful purpose.

[4] Plaintiff further asks for \$1,000 damages from defendants for vexation, humiliation, and mortification caused by the unlawful acts of defendants. He testified in a vague way that he had suffered damages to that extent; but he did not testify definitely as to them, or to the amount.

In the absence of certain testimony that

plaintiff suffered vexation, humiliation, and mortification because of the acts of defendants, and considering the testimony that plaintiff invited defendants to dine with him while they were trespassing upon his plantation, we cannot view the claim based on humiliation and mortification as having been seriously made. The claim has not been sufficiently proved.

The same is true of plaintiff's claim for damages suffered by him through the illness of his wife. The testimony does not show that the conduct of defendants caused Mrs. Sandlin's illness, or that plaintiff was put to any expense on account thereof.

[5] Mrs. Sandlin, intervener, appeared and testified to her claim for \$1,000 damages because of alleged shock, annoyance, anxiety, worry, suffering from a long spell of sickness, and prolonged mental suffering. She testified that at the time defendants visited her husband's plantation she was away from home, teaching school, and that she was told of the circumstance on her return home that evening, February 25, 1913, and that she continued to teach school until about May 1st (the school closed May 10). She did not consult a physician until July, and she did not then tell him about defendants' visit, or any shock to her resulting therefrom. We gather from Mrs. Sandlin's testimony that she worried over the financial condition of her husband, the loss of Frank Gilford as a tenant, and the failure to get another tenant, and that she was not shocked by the acts of defendants. She could not have been shocked by the visit of defendants, when she was a mile away from home at the time of the visit. She has failed to prove her case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed in part and affirmed in part; that there now be judgment in favor of plaintiff Sam Bartow Sandlin and against defendants in solido for \$593.05, with costs in both

courts; and that the judgment against Mrs. Sandlin be affirmed, with costs.

LECHE, J., dissents.

See dissenting opinion of O'NIELL, J., on motion to dismiss appeal, 78 South. 264.

(78 South. 320)

No. 22069.

RICHARDSON v. LIBERTY OIL CO. et al

(Jan. 28, 1918. Rehearing Denied April 1, 1918.)

(Syllabus by the Court.)

1. STATES  $\S$ 191(2)—"SUIT AGAINST STATE"—SUIT AGAINST OFFICERS OR AGENTS OF STATE.

A suit by a citizen to recover possession of real property, or to enforce a real right, against officers or agents of the state, who assert title and possession in behalf of the state, is not a suit against the state, within the meaning of the Eleventh Amendment to the Constitution of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit against the State.]

2. DEDICATION  $\S$ 19(5) — RIGHTS OF PURCHASER—BOUNDARIES.

Where a parcel of land is sold by a deed in which it is merely designated as "Lot No. III," according to a specified plan, and the plan shows it as bounded by other lots, variously designated, the boundaries of which are indicated by lines in nowise differing from each other, the purchaser acquires no greater rights of servitude, or otherwise, upon the theory of a dedication to public use, with respect to a lot, indicated by four parallel lines and bearing the legend "New Orleans Canal," than with respect to any other lot constituting his boundary.

3. DEDICATION  $\S$ 13—CANAL CORPORATION—SERVITUDES OR INCUMBRANCES.

Act No. 18 of 1831, having established a corporation for the construction of a canal and a road along the side of it, with authority to acquire land for that purpose and charge tolls for the use of the canal and road, subject to the condition that the entire property should revert to the state, complete and in good repair, at the expiration of 35 years, and, in consideration of such reversion having exempted the capital stock of the corporation, fixed at \$4,000,000, from all taxation by the state, or under its authority, for a period of 39 years, it would be absurd to suppose that it was within

the contemplation of the parties that the corporation should be able, by dedicating the property to public use, to make it free to the public, or, after enjoying the exemption during the prescribed period, to comply with its obligation in the matter of the reversion, by turning the property over to the state burdened with servitudes or other incumbrances established by the corporation for its own advantage.

**4. CANALS —13—CANAL PROPERTY—MAINTENANCE—CLOSING OR OBSTRUCTING.**

The New Basin Canal and Shell Road, with the strips of land on each side, are the property of the state, to be administered in the public interest, and, as the state required a road to be built on the west side of the canal, and has caused it to be maintained and kept open to the public for many years, it may very well be that rights have been acquired with reference to its maintenance which it would be necessary to consider if the road were now closed or obstructed. But what may be true in regard to the road has no application to the strip of land, or swamp, between the western edge of the road and the western line of the tract constituting the canal property.

**5. CANALS —3—CONSTITUTIONAL LAW —20—CONSTRUCTION BY LEGISLATIVE AND EXECUTIVE BRANCHES—CONSTITUTIONALITY OF STATUTE.**

The legislative and executive branches of the state government having for 30 years interpreted the constitutional prohibition against the alienation or leasing of the "New Basin Canal and Shell Road and their appurtenances" as applying to the property so designated as a whole, and as inapplicable to the leasing of property unnecessary to the canal, and the court, being of opinion that such interpretation is admissible, accepts the same, and holds that Act No. 144 of 1888 and Act No. 60 of 1910, authorizing such leases, do not contravene said prohibition.

O'Niell, J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Suit by William P. Richardson against the Liberty Oil Company and the Board of Control for the New Basin Canal and Shell Road to annul a contract whereby the Board leased to the Oil Company certain land, and to enjoin the lessee from occupying or improving such land. Judgment for plaintiff, and defendants appeal. Judgment annulled, and judgment rendered in favor of defendants rejecting plaintiff's demands and dismissing suit without prejudice to any party.

A. V. Coco, Atty. Gen., Harry P. Gamble, Asst. Atty. Gen., and McCloskey & Benedict, of New Orleans, for appellants. Edmond J. Jacquet, Max Hubert, and Mark M. Boatner, all of New Orleans, for appellee.

**Statement of the Case.**

MONROE, C. J. The purpose of this suit is to annul a contract whereby the "Board of Control of the New Basin Canal and Shell Road" (a corporation created by the state and charged with the administration of the state property indicated in its name) leased to the Liberty Oil Company a parallelogram of land forming part of that property, to wit, "a certain piece of ground \* \* \* situated on the west bank of the New Basin Canal, between Broad and Dorgenois streets, measuring 475 feet in length and having a width of 87 feet, beginning at a line 17 feet from the edge of the turnpike road and extending to the western line of the property of the state of Louisiana," and (by injunction) to prohibit the lessee from occupying, or erecting any buildings or works upon, or otherwise depriving plaintiff and the public of the free use of, the tract so leased.

Plaintiff alleges as his cause of action that he owns an undivided half interest, and is usufructuary of the remaining interest, in a square of ground, No. 589, which is "bounded" on one side by the "New Basin Canal and Shell Road"; that is to say (as alleged in another article), that adjoining petitioner's said property on the side towards the canal is a strip of land of about 120 feet in width from petitioner's property line to the water's edge, which, with a similar strip on the other side, extends along the entire length of the canal, and, with the canal itself, and all of its appurtenances, belongs to the state of Louisiana, having been acquired from the New Orleans Canal & Banking Company agreeably to the provisions of Act No. 18 of 1831, by virtue whereof that company was

created, and the canal constructed; that the company acquired large bodies of land, through which it caused to be laid off a tract 300 feet in width for the purposes of and through the middle of which it constructed a canal, leaving a strip of land 120 feet in width upon either side, and on the strip upon the "upper side" constructed a levee and road, as required by the statute mentioned, and that, after such survey and construction, it sold portions of the land lying outside of the 300-foot tract which had been so acquired—

"including petitioner's above-described property, which was sold by reference to a plan drawn by Charles F. Zimple, deputy city surveyor, on April 27, 1833, on which petitioner's said property was shown to adjoin said roadway, and thereby the said roadway and canal were shown and figured, said sale of petitioner's property being made to S. W. Oakey, petitioner's author; \* \* \* from which it results that the said roadway and the whole of the space reserved therefor and for the service of said canal were irrevocably dedicated to said purposes, and to public use, and that a servitude in favor of such adjoining property was thereby created for the use by said adjoining proprietors and by the successive owners thereof of such public places for purposes of navigation, the loading and debarkation of freight, and similar related purposes, which said servitude includes the right of ingress and egress and of way to and over such spaces in aid of such purposes."

Assigning still further reasons therefor, he alleges that the lease in question will operate to divest his vested rights, impair the obligations of the contract whereby his land was acquired, and deprive him of his property without due process of law, in contravention of the public policy of the state and of the state and federal Constitutions, and he prays for judgment decreeing its nullity and enjoining defendants from acting under it. The oil company filed exceptions of estoppel, vagueness, inconsistency of allegation, and no cause or right of action, and the board, represented by the Attorney General (through his assistant), filed an exception to the jurisdiction of the court alleging:

"That defendant herein is merely the representative of the state of Louisiana in matters

pertaining to the New Basin Canal and Shell Road, as set out in section 1 of Act 144 of 1888, as amended by section 1 of Act 60 of 1910; that the suit herein filed is, in truth and fact, a suit against the state of Louisiana, who cannot be brought into court without her permission; that respondent board is a creature of the law, brought into being by the act aforesaid; that it has no authority further than that given by said acts; and, under said acts, said board has no capacity to be sued, nor stand in judgment."

In the alternative, and in the event the court should maintain its jurisdiction, and reserving its rights with respect to its exception, the board then pleaded the same exceptions as its codefendant, and thereafter pleaded an exception to the jurisdiction *ratione materiæ*, which exception, as also that previously filed by the board, and the exception of no cause or right of action filed by the oil company, were overruled, and the others, by consent, were referred to the merits. Reserving the benefit of the exceptions so overruled, defendants then answered, setting up, *inter alia*, Act 78 of 1858 and Act 60 of 1910 as vesting in the board the authority to make the lease of which plaintiff complains, whereupon plaintiff, with leave of the court, filed a supplemental petition attacking those statutes as unconstitutional, to which it was excepted that it changed the issue and was inadmissible, which exception was overruled. There was then a trial on the merits, resulting in a judgment for plaintiff, from which defendants prosecute this appeal.

Act No. 18 of 1831 created the New Orleans Canal & Banking Company (hereinafter called the Company), and authorized and required it to excavate a navigation canal from some point in New Orleans, or its suburbs, to Lake Pontchartrain, a distance of perhaps six miles, through what was then a swamp, the inducement to the Company being that it should have the right to collect tolls from vessels using the canal and from persons, on horseback or in vehicles, using the road that was to be constructed upon the side of the

canal, and that its capital stock of \$4,000,000, should be exempt from state and municipal taxation during the life of its charter, i. e., until 1870.

Section 8 of the act required the construction of a canal 60 feet wide at the top of the water and of sufficient depth to admit vessels drawing 6 feet, with one or more basins, and a breakwater to facilitate the ingress and egress of vessels, and required the Company to keep the same in repair, and to begin the work within one year, and complete it within three, to be extended to six years under certain circumstances.

Section 9 authorized the Company to acquire land by agreement or expropriation, and, where it became necessary to resort to the course last mentioned, prescribed the form and manner of the proceeding, and included the following:

"Provided, that the proprietors of lands, so estimated and appropriated, shall always have the right to communicate with said route and canal, and this in the whole extent of said lands, which shall be considered as riparious to said canal."

Sections 11 and 12 related to the tolls to be charged to vessels and the manner of collecting them. Section 14 provided that the Company should build a levee upon the "upper side" (called "upper side" because it was up stream, considered with reference to the current of the Mississippi river, though, considered with reference to the compass, it was the west and southwest side), and should lay out a road thereon, not less than 25 feet wide, and cover the same with sand, shells, or other hard substance, so that it might at all times be suitable for carriages to travel upon, with a suitable draining canal on the upper side, and that it might establish toll-gates thereon and collect certain tolls.

Section 26 reads:

"That from and after the expiration of thirty-five years after the passage of this act, the property in the said canal and road, with all

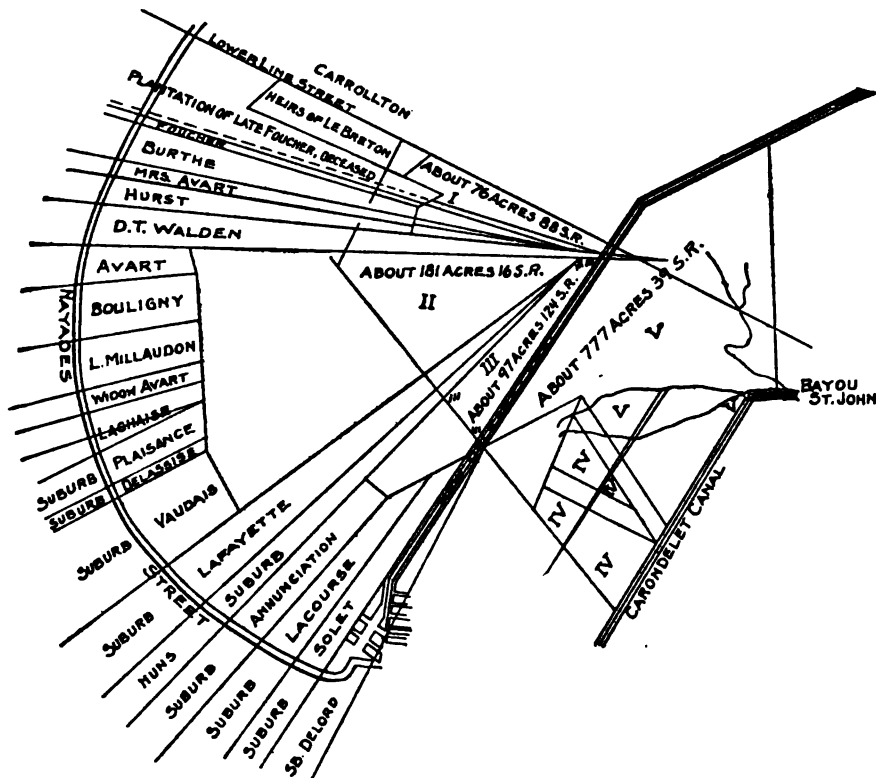
the land on each side which it has a right to acquire by forced sale, \* \* \* or otherwise, to the extent of 120 feet on each side of the canal, together with the machines and utensils belonging to the canal, as also the house of the toll receiver, shall be vested in the state of Louisiana, with all the rights to receive tolls therefrom, which are hereby granted to the said company, and in the situation required by the 8th and 14th sections of this act; and in consideration thereof the stock of the said company shall be exempt from taxation by the state, or by any parish or body politic, under the authority of the state, for the whole term of this charter."

Proceeding under the charter so granted, the Company found it expedient to cut the canal, for part of its length, through a portion of the swamp in the rear of the city which formed part of the "Macarty" plantation, and to that end to buy from one co-owner an undivided one half interest in the entire plantation, at the agreed price of \$130,000, and from the other co-owners the other undivided half interest in the 300-foot tract through the middle of which the canal was to be excavated, and it thereafter excavated a canal according to the requirements of the statute, leaving a strip of land 120 feet in width on each side. On June 7, 1833, the Company, together with its owners in undivision (Messrs. Kohn, Millaudon, and Slidell), sold to Samuel W. Oakey a tract containing about 97 acres of the Macarty land lying beyond (to the southwestward) of the canal tract, the description according to which the sale was made being as follows:

"A lot or parcel of ground situated in this parish and designated by the No. 3 on plan drawn by Charles F. Zimple, D. C. S., on April 27, 1833, of that portion of ground designated and known as Macarty's plantation, and deposited in the office of said notary, which said portion of ground measures about 97 acres; it being understood that the said S. W. Oakey is in no way bound by the plan before referred to as to any of the lines purporting to be lines of the Nun's Suburb and Suburb Annunciation, which he declared to be wholly incorrect, but fully as to the extent and quantity of said lot No. 3; it being expressly understood that said vendors do not guarantee the title to the lot or parcel of ground above described."

Plaintiff has offered in evidence a reduced blueprint of the Zimple plan thus referred to, and we incorporate in this opinion a fairly accurate, though roughly prepared, copy of the same.

made in 1845 of land adjoining the canal tract, in which decisions it was held that the purchasers had acquired rights with reference to the canal or the strips of land upon either side of it by reason of the fact that



Plaintiff has also offered two reduced photographs of another plan by Zimble, drawn in 1834, on which there appears, upon the upper strip of the canal tract (that which adjoins the 97-acre tract of which plaintiff's land formed part), the legend: "Turnpike Road—Levee."

In 1852 and 1856, respectively, this court rendered certain decisions, in the cases of **Key and Bruning** against Canal & Banking Company, predicated upon sales, based upon a plan which the Company had caused to be

the land was sold to, and purchased by, them, according to descriptions and with reference to a plan which represented it as abutting or fronting on the canal tract as a locus publicus; and whether for that reason or some other, the General Assembly in 1858 passed Act No. 78 of that session, the preamble of which, after reciting, in substance, the twenty-sixth section of the act of 1831 (supra), proceeds as follows:

"And, whereas, there is reason to fear that a portion of the land which the Company has

already acquired to the extent of 120 feet on each side of the canal, and which is necessary for the present use and purposes of the canal, its landings, road and basins, and for the future enlargement of the canal, which the wants of commerce already imperiously demand, may be incumbered and appropriated to other uses than those contemplated by the act aforesaid."

The act then declares that all the land acquired to the extent of 120 feet on each side of the canal "belonging to the said Company" shall be retained by it as trustee for the state, and devoted to the sole use and purposes of the canal, its landings, roads, basins, and its future enlargement and improvement; that the Company shall not give, sell, alienate, or dispose of, by lease or otherwise, any portion of the land on either side of the canal to the extent of 120 feet for any use or purpose other than described in the first section of this act, nor shall any person or body politic, or corporation, have power to use and appropriate any portion of said land, except for the purposes of police regulations; that, whenever it shall be deemed necessary for the city of New Orleans to occupy any portion of the 120 feet of land on either side of the canal for the purposes of a banquette in front of the property facing the road or landings of the Company, the banquette shall not exceed eight feet in width and shall be raised to the level of the Saue crevasse of 1849, so as to protect the city from inundation; that the Company shall have power to enlarge the canal by widening the same and increasing the number and extent of the basins to the utmost capacity which the land owned by the Company may admit of, and to make such other improvements as may facilitate commerce:

"Provided, however, that it is the true intent and meaning of this act that all improvements made under the provisions thereof shall inure to the benefit of the state, in the same manner as is provided for in the charter of said Company."

In 1866 the entire canal property reverted to the state, as provided by the act of

1831, and, under Act 12 of 1866, was leased to Richard Taylor, with whom, agreeably to Act 118 of 1867, the state entered into another contract whereby he was authorized to widen the canal to 100 feet and construct additional basins, and in consideration thereof he was relieved of the obligation to make the payments required by the former contract. The fifth section of the act of 1867 reads:

"That at the expiration of said lease, all the improvements made to said canal and basins, and on land belonging to the state, or on lands purchased or expropriated, shall become absolutely the property of the state of Louisiana, without any claim of said lessee."

As we understand it, the canal was widened as contemplated by the contract last mentioned, and the basins were probably constructed, but the arrangement appears to have been unsatisfactory to the state; and on its termination, whether amicably or otherwise, an article was incorporated in the Constitution of 1879 (article 180), declaring that "the New Basin Canal and Shell Road and their appurtenances shall not be leased or alienated," and the General Assembly was required to provide for the appointment by the Governor of a superintendent, which it did, by Act 127 of 1880. By Act 144 of 1888, however, the board of control (defendant herein) was created and placed in charge of the property, and was authorized to "lease whatever property belongs to the Canal and Shell Road not necessary for their use," with the condition that "no lease of said property shall extend beyond their terms of office, without the advice and consent of the Governor."

The act also conferred upon the board the "capacity of suing," but stopped at that point, and did not confer the capacity to be sued, or to stand in judgment for the state, and those provisions have been re-enacted in Act No. 60 of 1910. The prohibition against the leasing or alienation of the "New



Basin Canal and Shell Road and their appurtenances" has been retained in the present Constitution (article 195).

It appears from the evidence and uncontradicted statement in the brief of the Attorney General that there are over 50 leases now in force, similar in character to that now under consideration (that is to say, of land lying upon the outer edge of one or the other of 120-foot strips which border the canal), from which the state, through the board, derives a revenue of about \$14,000 per annum; that the board makes a monthly report of its receipts to the state treasurer; that its books are examined by the auditor of public accounts every three months, of which examinations reports are made to the Governor, and that reports of the affairs of the Canal and Shell Road are made to the General Assembly at its biennial sessions. It also appears that the leases are held by dealers in sand, gravel, shells, brick, lumber, and many other articles, the trading in which constitutes the commerce that is carried on through the canal and supplies the tonnage; and we find it plainly inferable from all the testimony that, other than as thus stated, the land so leased has never been used for the purposes of the canal, and has never produced any revenue to its owner. In fact, that which is the subject of the lease here in controversy had never been reclaimed from the swamp until it was filled and built upon by the lessee before the court.

#### Opinion.

Upon the exceptions:

[1] The question first to be inquired into is whether the trial court was vested with jurisdiction to render the judgment appealed from, and whether this court has the power to affirm it. Upon that question it has been understood that the position of the learned Attorney General was at one time sustained by the jurisprudence of the Su-

preme Court of the United States, which is controlling upon the subject, but in *United States v. Lee*, 106 U. S. 193, 1 Sup. Ct. 240, 27 L. Ed. 171, that august tribunal handed down a decree based upon an opinion the substance of which, so far as it need be here stated, is expressed in the syllabus as follows:

"(1) The doctrine that the United States cannot be sued as a party defendant in any court whatever, except where Congress has provided for such suit, examined and reaffirmed, and the nature of this exemption considered.

"(2) This exemption is, however, limited to suits against the United States directly and by name, and cannot be successfully pleaded in favor of officers and agents of the United States, when sued by private persons for property in their possession as such officers and agents.

"(3) In such cases a court of competent jurisdiction over the parties before it may inquire into the lawfulness of the possession of the United States, as held by such officers or agents, and give judgment according to the result of that inquiry."

In reaching the conclusion thus stated the court had no occasion to consider the Eleventh Amendment to the Constitution of the United States, declaring that the judicial power of the United States shall not be construed to extend to any suits brought against one of the United States, by citizens of another state, or citizens or subjects of a foreign state, since the suit to be decided was not against one of the United States; but, in the later case of *Tindal v. Wesley*, 167 U. S. 218, 17 Sup. Ct. 775, 42 L. Ed. 142, in which plaintiff (Wesley) sued for the recovery of real estate held by the secretary of state of South Carolina and another as the property of that state, and the objection here set up by the board of control was urged by them, that court said:

"If a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the government, we cannot perceive how the present suit can be regarded as one against the state merely because the defendants assert a right of possession in

the state through them as its officers and agents. The essential principles of the Lee Case have not been departed from by this court, but have been recognized and enforced in recent cases."

And the court cites several of the cases thus referred to, and proceeds to cite and consider a number of others in which the Eleventh Amendment was involved, and thus states the result:

"The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf."

Applying that doctrine to the instant case, we can discover no difference in principle between a suit to recover possession of real property and a suit to enforce a real right in such property. We therefore conclude that the exception to the jurisdiction on the ground that this suit is against the state was properly overruled. We are also of opinion that the other exceptions were not, upon the face of the petition, well founded.

Upon the merits:

[2] It is admitted that the New Orleans Canal & Banking Company acquired an undivided half interest in the Macarty plantation, a body of land of much greater width than the tract 300 feet wide devoted to the Company's canal and roadway; that in June, 1833, it, with its co-owners, sold to S. W. Oakey, from the land so acquired, a certain lot "No. III," containing about 97 acres according to a plan by Charles F. Zimble, deputy city surveyor, of date April 27, 1833; that plaintiff's square, 580, formed part of that lot and fronted on the 300-foot tract upon which the canal and roadway, now known as the New Basin Canal and Shell Road, had then been constructed; that the blueprint filed in evidence by plaintiff is a correct copy of the Zimble plan of 1833; and that the abstract of title filed by plaintiff is correct. It is also admitted that the Company acquired the

other half interest in the 300-foot tract. The description in the conveyance from the Company to Oakey gives the number of the lot and of the acres, and for the rest refers to the Zimble plan. Turning to that plan, we find that lot "III", bears the same relation to other contiguous property as to the canal property, and that neither the description nor the plan convey the slightest suggestion that it is entitled to a servitude upon one boundary more than another. The other parcels of land constituting the boundary are represented in the usual way, with the usual lines delimiting and separating them from lot III, and are designated, in some instances, by the names of the owners and, in others, by numbers, as I, II, IV, etc., with their acreage, and lot III is separated from the canal tract by a line differing in no respect from that which separates it from lot II, the canal tract being designated by four parallel lines extending beyond the confines of lot III in each direction indicating its subdivision into three parts, with the legend "New Orleans Canal" imposed upon the lines. No better method of designating or delimiting it occurs to us, and none less indicative of any intention to make a dedication of it to the public; and, as the tract formed part of a body of land in which the Company had bought outright an undivided half interest for \$130,000, it is clear that such dedication did not, of necessity, result from its sale of adjoining tracts. A railway company may sell land adjoining its right of way without dedicating or imposing servitudes upon the strip so described, in which it owns but a limited fee, and equally may a canal company, or a canal and road company, sell land adjoining the tract upon which its canal and road are constructed, and of which it is the full owner, without of necessity subjecting such tract to servitudes in favor of its vendees, or the public. As appears from the foregoing statement of the case,

plaintiff alleges that the property now owned by him was sold "by reference to" the Zimble plan of April 27, 1833—

"on which petitioners said property was shown to adjoin said roadway, and thereby the said roadway and canal were shown and figured, \* \* \* from which it results that the said roadway and the whole of the space reserved therefor and for the service of said canal were irrevocably dedicated to said purpose, and to public use, and that a servitude in favor of such adjoining property was thereby created, for the use by said adjoining proprietors and by the successive owners thereof, of such public places, for purposes of navigation, the loading and debarkation of freight and similar related purposes, which said servitude includes the right of ingress and egress and of way to, and over, such spaces, in aid of such purpose."

[3, 4] Those allegations of fact and the conclusion deduced therefrom find inadequate support in the Zimble plan, upon which the canal and road tract are represented, as we have stated, by four parallel lines with the words "New Orleans Canal" inscribed upon them, the space in width occupied by them on the blueprint being less than an eighth of an inch, thus: ~~New Orleans Canal~~. The word "road" does not appear. The Company was obliged by its charter to construct a road not less than 25 feet wide, which would leave a space of 95 feet between it and the line between the 120-foot strip and the adjoining land, and it is not pretended that any wider road has ever been constructed, though the rest of the strip was, no doubt, to be devoted to the purposes of the canal, as the owners and administrators might deem advisable, and not to the free use of the adjoining proprietors or the public. It is true that section 9 of the charter, after authorizing the Company to acquire land by agreement or by estimation" and "appropriation," contained the proviso:

"That the proprietors of land so estimated and appropriated shall always have the right to communicate with said route and canal, and this, in the whole extent of said lands, which shall be considered as riparious to said canal."

That proviso has, however, no application to the land involved in this suit, which was

acquired by purchase, and it does not appear in this record that the Company acquired any land otherwise than by purchase; but, if it had acquired all the land needed for the canal and road by expropriation (or "estimation" and "appropriation"), we apprehend that some difficulty would have been found in reconciling its right and obligation to administer the property with the privileges thus granted to the adjoining proprietors.

It is worthy of remark that though the grant is special, and is by its terms confined to the expropriated proprietors, the plaintiff, whose author was not in that class, is claiming about the same privileges, merely upon the face of the Zimble plan. And our conclusion upon that point is that the Zimble plan does not sustain the claim. Extending the inquiry beyond the plan to the law constituting the contract between the canal company and the state and defining the powers and obligations of the Company, we find what appears to us a grave reason why the Zimble plan should not have subjected the canal property to the servitude claimed by plaintiff or otherwise have incumbered it. Under that law and contract, the Company was obligated to surrender the entire canal property to the state at the expiration of thirty-five years, free of incumbrance. We use the expression "free of incumbrance," though it is not found in the statute, because we are of opinion that it should be read into it by necessary implication, and because the statute was so interpreted by the General Assembly in Act 78 of 1858, and that interpretation has never, so far as we are informed, been questioned. The state, by the act of 1831, declared that, in consideration of the reversion of the property to it, "the stock of the said company [fixed at \$4,000,000] shall be exempt from taxation by the state, or by any parish or body politic, under the authority of the state, for the whole term of this charter [a period of 39 years]," and it would be absurd to suppose that it entered into the contemplation of

either party that, after enjoying that exemption, the value of which in cash may have exceeded the value of the property to be surrendered, the Company should be able to discharge its obligation in the premises by turning over to the state property rendered valueless by reason of mortgages and servitudes to which it had been subjected. The statute itself declared that it should revert to the state "in the situation required by the 8th and 14th sections of this act," meaning, clearly, completed and in good repair; and that it should be unincumbered with respect to obligations incurred in the interest of the Company goes without saying. Where, then, did the Company find the authority to make any dedication of property which it held under such conditions? Where did it find the authority, in order to sell its adjoining land, to concede to its vendees rights and servitudes in or upon property, which, according to the law and to its contract with the state, was to revert to the state free of incumbrance? And where would the courts find the authority to obstruct the state in its administration of its own property by sustaining the claims of those to whom such rights and servitudes were attempted to be conceded?

We are referred by learned counsel to the cases of *Keay v. N. O. Canal & Banking Co.*, 7 La. Ann. 259, and *Bruning v. N. O. Canal & Banking Co.*, 12 La. Ann. 541, from which it appears that in 1845 the Company caused a certain body of land which it owned adjoining the canal tract, and through which the canal survey had probably been projected, or made, as in the instant case, to be laid off into squares and lots, and had made sales thereof at public auction by reference to colored lithographs of a plan representing them as abutting as upon public places, on the 120-foot strips on the sides of the canal, and that the plaintiff, having purchased some of the property so offered, complained in the one case that the Company had thereafter cut a ditch

or draining canal within three feet of his line, and in the other that it had converted what was represented to be a landing and locus publicus into a basin both of which complaints were held to be well founded and entitling the plaintiff to relief, though the court took occasion to intimate, in the case first mentioned, that it was not dealing with the interests of the state, but only with the interests of the parties who were before it, viz. the plaintiff and the Company. One of the cases was decided in 1852, the other in 1856, and in 1858 the General Assembly enacted the statute containing the declaration that there was reason to fear that the canal property might be "incumbered" or appropriated to other uses than those for which it was intended, and prohibiting its alienation, leasing, etc.

The cases have no particular application here; they arose out of sales made in accordance with a plan that came into existence in 1845, and showed lots and squares abutting on, or surrounded by, streets, whereas the Zimple plan, on which plaintiff relies, shows merely tracts of land, of various dimensions, the one bounding, but not abutting on, the other. The interests of the state were not represented or considered in either of the cases.

Our attention is also called to the cases of *State of Louisiana v. N. O. City & Lake R. Co.*, 104 La. 685, 29 South. 312, and *Board of Control v. H. Weston Lumber Co.*, 109 La. 926, 33 South. 923. In the case first mentioned the Attorney General and associate counsel brought suit in the name of the state and of the board of control for nearly \$80,000, alleged to be due for the use and occupancy of land on the northeast side of the canal upon which defendants' track was laid, and it was held that there could be no recovery, for the reason that the road had been built, as by legislative sanction, on public land, after due notice, and had been there

maintained without objection or claim for compensation during a period of 23 years; also that Act 84 of 1882, authorizing the building and maintenance of railroads on public lands, was so far applicable to the case as to prevent recovery. On rehearing it was said that plaintiffs could not collect rent because the renting of the property was prohibited by the Constitution.

In the case last mentioned the board of control brought suit, on behalf of the state, for the recovery of a parcel of land forming part of the canal tract of which defendants were alleged to be in possession, asserting title. Defendants answered that the parcel never belonged to the state, or, if it ever so belonged, that the state was estopped to assert its title by reason of its acquiescence in defendants' possession under a perfect title for more than 30 years. It was held by this court that the vendor of the original defendant had no title by purchase, could have acquired none by possession, and could have conveyed none to defendants, who were in the attitude of obstructing a public road. Defendants traced their title to a tax sale made by a constable in 1859 under the supposed authority of Act 285 of 1858. It was held that the act conferred no authority to sell any part of the canal tract, 300 feet in width, and, moreover, that the sale included no part of that tract.

It appears, therefore, that in both cases what was said to the effect that the land constituting the 300-foot tract was a public highway, in the ordinary sense of that term, was beyond the requirements of the occasions, and that the various matters which have now been brought to the attention of the court were not considered.

Plaintiff, through learned counsel, contends that the Constitution prohibits the leasing of the "New Basin Canal and Shell Road and their appurtenances." That contention and the assumption that plaintiff has the stand-

ing to urge it are predicated upon the theory that the 120-foot strips of land upon either side of the canal are public highways, the obstruction of which any abutting proprietor has the right to enjoin in so far as it may inconvenience him, and more particularly where the obstruction of which he complains is expressly prohibited. But these strips, considering each of them as a whole, are not public highways in the ordinary sense of that term. The whole tract, 300 feet in width, with the canal and the strips, is state property, to be administered by the state government in the public interest, the asset of paramount importance in which is the canal, and if, in the opinion of the state officials vested with its administration, it were deemed advisable to consume the whole of the strip on the east side in widening the canal, or to occupy it entirely with landings, or freight sheds, or destroy its continuity with basins, we can discover no reason why those steps should not be taken. As to the strip on the west (on "upper") side, the law requiring the company to build and maintain a road upon it not less than 25 feet in width has never been repealed. The road has been maintained by the state since the reversion of the property, and it may very well be that rights have been acquired with reference to its maintenance which it would be necessary to consider if it were now closed or obstructed. But what may be true in regard to the road has no application to the strip 95 feet in width which should be found between the western edge of the road and the western line of the 300-foot tract constituting the canal property. That land, or, as is mostly the case, swamp, belongs to the state, just as the canal belongs to it, and, whatever may be the power of the state with respect to its ultimate destination, we are unable to discover that it is subject to any mortgage or servitude imposed or conceded by the Company in favor of any individual. It has re-

mained for, say, 85 years, unreclaimed from the swamp, idle and unproductive, of no use to the canal, to the owners of the adjoining land, or to the public, and so long as it remains unfilled must be a detriment, rather than an advantage, to such land; the testimony to the effect that, by affording access to the road and canal, it adds to the value of the land, being predicated upon the assumption that it may be filled by the state, and opened to the adjoining proprietors, neither of which steps can the state be compelled to take.

Mr. McWilliams, real estate dealer, called by plaintiff, gave the following testimony on cross-examination:

"Q. Were you there before the Liberty Oil Company filled up that ground? A. Yes, sir. Q. It was all swamp land out there? A. Yes, sir. Q. Who was on it; anybody? A. It wasn't being used; no, sir."

Mr. Zander, a civil engineer, called by defendants, was shown a map of survey which he said had been made by him of the square of ground here in question, and gave the following testimony concerning the same to wit:

"Q. Was it a physical survey of the property? A. Yes, sir. Q. What was the character and nature of the ground immediately contiguous to the paved shell road and the new basin canal? A. It was a willow swamp."

Plaintiff could not, therefore, reach the road from any point immediately in front of his square, even though the Liberty Oil Company had erected no building. If the streets on each side of his property extending back at a right angle from the canal tract are filled, he could, no doubt, reach the road and canal in that way, but, as we understand, his property has not been in use for some time, and it is not likely that he has concerned himself about the streets.

[8] Assuming, however, that he discloses sufficient interest to authorize his attack upon the constitutionality of Act 144 of 1888 and Act 60 of 1910, which authorize the board of control to lease whatever property belongs

to the canal and shell road not necessary for their use, "subject to the condition that no lease of said property shall extend beyond their terms of office without the advice and consent of the Governor," there is a good deal to be said by way of answer to the argument in support of that attack. The constitutional prohibition against the alienation or lease of the "New Basin Canal and Shell Road and their appurtenances" is susceptible, we think, of the construction that it was intended to be applied to the alienation and lease of the property as a whole, and not to prevent the board from disposing to the advantage of the state of articles which, worn out by use, could never be of any further service, or of leasing parcels of land such as that here in question, which have never been, and otherwise never will be, so far as can at present be known, either useful or productive. Moreover, the statute has now been in force for nearly 30 years, during which period, after a lapse of 22 years, the provision in question was re-enacted, and has at all times been sanctioned by the executive as well as the legislative departments of the state government, to which constant reports of its operation have been made. Beyond that we have had two constitutional conventions, many of the members of which, no doubt, were fully aware of the interpretation which had been placed upon the prohibition, and, though the prohibition itself has been retained, that interpretation appears to have been acquiesced in, so that, all the circumstances considered, we are of opinion that the attack on the statutes mentioned should not be sustained, and that plaintiff's demand should be rejected and his suit dismissed. In conclusion we think it proper to say that, as the parcel of ground leased to the oil company is described as "having a width of 87 feet, beginning at a line 17 feet from the edge of the turnpike paved road and extending to the western line of the

property of the state of Louisiana," it would appear either that the strip of land left on the west side of the canal is 129, instead of 120, feet in width, or the road 16, instead of 25, feet in width, or that the lease encroaches upon either a street, or defendants' land, on the west side of the 300-foot canal tract, and that it is not the purpose of this judgment to sanction either a reduction in the width of the road, which the General Assembly has declared shall be not less than 25 feet, or an encroachment by the board of control upon land that is not included in the canal tract.

It is therefore ordered and decreed that the judgment appealed from be annulled, and that there now be judgment in favor of defendants, rejecting plaintiff's demands, and dismissing this suit at his cost in both courts, without prejudice, however, to the right of any one who may have an interest so to do to inquire into, and to have determined, the question, whether the lease here complained of includes property necessary to a road 25 feet wide on the upper side of the canal, or property which is not part of the canal tract.

O'NIELL, J., concurs in the opinion that this is not a suit against the state, but is of the opinion that the entire strip of land 120 feet wide above the canal was dedicated to public use for a state highway, and that the statutes purporting to authorize the board of control to lease the part not necessary for the canal or shell road are unconstitutional.

(78 South. 430)

(No. 21411.)

BECK et al. v. NATALIE OIL CO. et al.  
(April 1, 1918.)

(Syllabus by Editorial Staff.)

1. MORTGAGES  $\S$  383—SUIT TO FORECLOSE—  
STATUTE—"ACTION IN PERSONAM."

A suit to foreclose a mortgage is not in personam within Code Prac. art. 26, defining an ac-

tion in personam to be where the debtor has bound himself towards another, personally and independently of the property which he possesses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Personam.]

2. HUSBAND AND WIFE  $\S$  273(11)—COMMUNITY PROPERTY—FORECLOSURE OF MORTGAGE AGAINST HUSBAND.

A husband, survivor in community, can stand in judgment alone in a suit via executiva or via ordinaria for foreclosure of a mortgage upon community property securing a debt due from him as head of the community.

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

Suit by Felix W. Beck and others against the Natalie Oil Company and others. From judgment dismissing the suit, plaintiffs appeal. Affirmed.

Hall & Jack, of Shreveport, for appellants. D. Edward Greer, of Houston, Tex., Thomas W. Nettles, of Coushatta, and Thigpen & Herold, of Shreveport (F. C. Proctor, of Houston, Tex., of counsel), for appellees.

PROVOSTY, J. The property involved in this suit was acquired by the father of plaintiffs while the community of acquets and gains existed between him and the mother of plaintiffs, and the mother of plaintiffs, as partner in community, became owner of one-half of it. This half the plaintiffs inherited from their mother, subject to the payment of the debts of the community. After her death one of the notes given for the purchase price of the property, and which was secured by vendor's privilege and special mortgage on the property, fell due, and suit was brought upon it against the father of plaintiffs, and judgment obtained condemning him to pay the debt, recognizing the said vendor's privilege and mortgage, and ordering the property to be sold to satisfy same. A fl. fa. issued on this judgment, and under this fl. fa. the property was seized and sold; and defendant

holds title under the purchase at this sheriff's sale.

The plaintiffs were not made parties to the suit in which this sheriff's sale was thus effected. On that ground they, through their tutor, bring the present suit to set aside the sale. Also on the ground that the property was succession property, and that a fl. fa. cannot issue against a succession.

As to the latter ground, suffice it to say that the fl. fa. did not issue against a succession, but against the father of plaintiffs individually.

Whether the husband, survivor in community, can stand in judgment alone in a suit for the foreclosure of a mortgage upon community property, securing a debt due by him as head of the community, is a question that has been often decided in the affirmative. But the learned counsel for plaintiffs say that in all these cases the proceedings were *via executiva*, not, as in the present case, *via ordinaria*; and they say that between the two there is a difference—that the one is in rem, whereas the other is in personam.

[1] Article 26 of C. P. defines an action in personam to be where the debtor "has bound himself towards another, personally and independently of the property which he possesses." Clearly, then, a suit to foreclose a mortgage is not in personam. Such an action when *via ordinaria* is personal in form merely, not in reality. In so far as it has for its object the foreclosure of a mortgage, it is in reality in rem, to the same degree precisely as is a suit *via executiva* having the same object. It is in personam, of course, in so far as it goes beyond that object. In so far as its object is confined to the foreclosure of the mortgage, its form is more favorable to the debtor than the *via executiva*, in that it proceeds by regular citation, and affords better opportunities for defense. A debtor could certainly not complain that he was being afforded a better opportunity for defense.

[2] But the learned counsel say that in the "innumerable" cases where it has been held that the surviving husband can be thus proceeded against alone the court has invariably said that he could be thus proceeded against *via executiva*, and that the inveterate use of that form of expression cannot possibly have been purely accidental, but must have been prompted by the idea that in such a case the proceeding has to be *via executiva*, and not otherwise. We have not deemed it worth while to go over all these cases to ascertain whether the court has confined itself, as stated, to said form of expression, for in those which we have examined we have found nothing which would suggest that the court intended said expression to be anything more than the approval of the mode of proceeding in the case before it.

The reason why the surviving husband may be thus proceeded against alone, without the heirs of his deceased partner in community being made parties, is just as applicable to a suit *via ordinaria* as to a suit *via executiva*. It is stated in *Hawley v. Crescent City Bank*, 26 La. Ann. 230, as follows:

"Upon the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community debts is not changed. He is absolutely personally bound for their payment, and his separate property may be seized and sold for their acquittal. This being his position, he has under his control the community property, which by law is expressly subjected to the payment of the community debts; and he has, so far as the final settlement and liquidation of the community after its dissolution is concerned, the same rights he had during its existence, because he is, after the dissolution under the same responsibilities for the community debts that he was before the dissolution. It is but just that he should have those powers. The community property continues under his control until the debts are paid. Until their final settlement and discharge the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain, until by the result of the final discharge of all the obligations of the community it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased spouse."



In Successions of M. S. & P. Cason, 32 La. Ann. 792, this court said:

"During the existence of the community, the husband is practically the owner of the community property, which he may sell, dispose of, and incur, by onerous title, at will, and without the concurrence of his wife. He is personally responsible for all of its debts. At his death it enters into and forms part of his succession, to be therein administered and devoted to the payment of the community debts, which are also his personal debts. The wife has no personal liability for the debts, and has no interest whatever in an insolvent community. In case of the dissolution of such a community by the prior death of the wife, her succession or heirs have no valuable interest in the community property. If \* \* \* the community be admittedly insolvent, they have no interest, and, consequently, no right, to provoke its liquidation. As to the community creditors, they are under no necessity to provoke its liquidation through the medium of the wife's succession, because it is settled they may disregard the wife's interest, and proceed directly against the community property in the possession of the husband, contradictorily with him alone."

This excerpt from the Cason Case is reproduced approvingly in the case of Luria v. Cote Blanche Co., 114 La. 389, 38 South. 279, in which, by the way, the foreclosure sale had been effected in an ordinary suit, as in the present case.

Counsel call attention to the facts that the heirs of the deceased wife in this case were minors; that the community was solvent; and that the property was sold for very much less than its real value. But the reason why it has heretofore in very many decisions been held that the husband can be proceeded against alone has not been because the heirs of the deceased wife were majors, nor because the community was insolvent, nor because the property had brought its full value; but simply and solely because after the death of the wife the husband retains his capacity of head of the community and its representative for standing in judgment in any proceeding for the foreclosure of a mortgage granted by him upon its property.

The judgment dismissing the suit is affirmed.

(78 South. 431)

No. 22948.

STATE v. LIEBER.

In re STATE ex rel. ELLIS, Dist. Atty.

(April 1, 1918.)

(Syllabus by the Court.)

1. STATUTORY OFFENSES—INTOXICATING LIQUORS.

Section 1 of Act No. 23, Extra Sess. 1915, p. 51, denounces these offenses: "To deliver for shipment," "to receive for shipment," "to ship or carry" intoxicating liquors into dry territory, beyond the quantities and except in the manner stated in the act.

2. INTOXICATING LIQUORS  $\S$  138—OFFENSES —"TO DELIVER FOR SHIPMENT" — "TO SHIP."

"To deliver for shipment" and "to ship" mean the same thing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ship.]

3. CRIMINAL LAW  $\S$  108(1)—VENUE—PLACE OF OFFENSE.

When intoxicating liquors are delivered for shipment or shipped, or when they are received for shipment to be carried into dry territory, the offense is committed in the place of the shipment.

4. CRIMINAL LAW  $\S$  108(1)—VENUE—PLACE OF OFFENSE.

When intoxicating liquors are carried into dry territory, the offense is committed in the dry territory.

5. CRIMINAL LAW  $\S$  108(1)—VENUE.

All trials shall take place in the parish in which the offense was committed, unless the venue is changed.

Information was filed against Ben Lieber, his exception to the court's jurisdiction was sustained, the bill of information was quashed, and accused was discharged, and the State, on relation of C. J. Ellis, District Attorney, applies for writs of certiorari and mandamus directed to John R. McIntosh, Judge Seventh Judicial District Court, Parish of Richland. Application for mandamus denied.

C. J. Ellis, Jr., Dist. Atty., of Rayville, for applicant.

SOMMERVILLE, J. In an information filed by the district attorney of Richland parish in the court of that parish, it was charged that Ben Lieber did deliver for shipment and did ship into Richland parish, "dry territory, to Charles Finley of Rayville, intoxicating liquors, from Ouachita parish, La., a wet territory."

Defendant excepted to the jurisdiction of the court "for the reason that the offense alleged in the information, if any such offense occurred, was committed in the parish of Ouachita, and can only be tried in that parish." The exception was sustained, the bill of information was quashed, and the accused was discharged. The district attorney has asked that a mandamus issue to the district judge, directing him to reverse his ruling and to overrule defendant's plea to the jurisdiction, as the offense charged was a misdemeanor, and the state has no right of appeal in the case.

The accused was prosecuted under the terms of Act No. 23, Extra Sess. 1915, p. 51. It is entitled an act "to regulate the shipment of intoxicating liquors into portions of this state where the sale of liquors is prohibited, either from within or without this state."

In his application for a mandamus, the district attorney states:

"That the particular crime charged was the shipment of two barrels or casks of beer from Monroe, Ouachita parish, La., a wet territory, to Rayville, Richland parish, La., a territory where the sale of intoxicating liquor is prohibited by ordinance, both in the same shipment and consigned to the same party, which constitutes the crime of shipping intoxicating liquors into dry territory in unlawful quantities as denounced by the act above referred to. \* \* \*

"That upon the trial of the aforementioned plea [to the jurisdiction], the facts appearing as set forth in paragraph 2 of this petition, his honor, Jno. R. McIntosh, judge of the Seventh judicial district court in and for the parish of Richland, sustained the plea to the jurisdiction of his court on the ground that a shipment of intoxicating liquors in unlawful quantities from Ouachita parish, a wet territory, into Richland parish, La., a dry territory, constituted a crime punishable in said Ouachita parish, the point of shipment.

"That the above ruling of his honor, Jno. R. McIntosh, is manifestly wrong, in that the crime denounced by Act 23 of 1915 is that of shipment into dry territory, which did not take place until the beer actually crossed the boundary line between Ouachita and Richland parishes."

Section 1 of the act, under which section the accused appears to have been charged, is as follows:

"Be it enacted by the General Assembly of the state of Louisiana, that it shall be unlawful for any person, firm or corporation to deliver for shipment, or to receive for shipment, or to ship or carry to any portion of this state where the sale of intoxicating liquors is prohibited by law or ordinance, any such intoxicating liquors, except as provided for in this act."

[1-4] The act is state wide in its scope and effect; and section 1 thereof makes it unlawful for one "to deliver for shipment," or "to receive for shipment," or "to ship or carry (from any portion of this state or any other state) to any portion of this state," which is dry territory, intoxicating liquors, except to families and drug stores designated in sections 9 and 10 of the act. The act may be violated in a wet parish as well as in a dry parish.

The information charged that:

Defendant "in the parish of Richland, aforesaid, and within the jurisdiction of the Seventh judicial district in and for the parish of Richland, said state, did then and there willfully and unlawfully deliver for shipment and did ship into Richland parish, a subdivision of the state of Louisiana where the sale of intoxicating liquors is prohibited by law and ordinance, from Ouachita parish, La., a wet territory, certain spirituous and intoxicating liquors," etc.

The intoxicating liquors were delivered for shipment and were shipped by Ben Lieber, the consignor and defendant, in and "from Ouachita parish," "into Richland parish, a subdivision of the state of Louisiana where the sale of intoxicating liquors is prohibited by law and ordinance," to one Charley Finley, the consignee.

Under the terms of the act, the consignor, Ben Lieber, is amenable under the act if he

delivered, in Ouachita parish, intoxicating liquors in certain quantities to be shipped, and did ship them into Richland parish, which is dry territory.

The act also makes the person, firm, or corporation who might receive intoxicating liquors for such purpose liable to prosecution.

If Lieber "delivered for shipment," in Ouachita parish, and "did ship," intoxicating liquors from that parish into Richland parish, he delivered such liquors to a common carrier or other person in Ouachita parish. His violation of the law was completed at the moment he did so "deliver for shipment" and "did ship" the liquor in question into Richland parish. Such misdemeanor had its origin and completion in Ouachita parish.

Section 1 of the act makes it an offense:

First. To ship intoxicating liquors, or to deliver them for shipment, into dry territory.

Second. To receive intoxicating liquors for shipment into dry territory.

Third. To carry intoxicating liquors into dry territory, in which latter case there must be the transportation of the liquors into dry territory to make the offense complete.

The charge against Lieber is that he did "deliver for shipment and did ship." The information does not charge that he carried or transported the liquors from Ouachita into Richland. That, also, would have been an offense under the statute for which he might have been prosecuted in Richland parish, because that offense would have been committed in Richland parish.

The charge against defendant is that he did "deliver for shipment and did ship" intoxicating liquors from Ouachita parish into Richland parish. "To deliver for shipment" and "to ship" is the same thing. To ship is defined:

"To deliver to a common carrier, forwarder, express company, etc., for transportation, whether by land or water or both." Century.

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[5] Having delivered intoxicating liquors to, and having shipped them by, a common carrier in Ouachita parish into Richland parish, Lieber violated the law in Ouachita parish, and he cannot be tried for the offense in Richland parish. All trials shall take place in the parish in which the offense was committed, unless the venue is changed. The exception to the jurisdiction of the Seventh judicial district court of Richland parish was properly sustained.

It is therefore ordered, adjudged, and decreed that the application of the district attorney for a mandamus to be issued herein is denied.

(78 South. 433)

No. 21432.

ELKS THEATER CO. v. CITY OF NEW IBERIA.

(April 1, 1918.)

(Syllabus by Editorial Staff.)

1. TAXATION ~~§~~241(3)—EXEMPTIONS—PROPERTY OF FRATERNAL ORDER—CONSTITUTION.

A theater of a fraternal order used for fraternal purposes, the hall or auditorium being also used for picture shows and theatrical performances, and rooms in the building being leased as stores, was not exempt from taxation under Const. art. 230, as belonging to a fraternal organization, in view of the proviso that the property exempted be not leased for purposes of private or corporate profit or income.

2. MUNICIPAL CORPORATIONS ~~§~~971(3)—TAXATION—SUPPLEMENTING ASSESSMENT ROLL—AUTHORITY OF CITY—STATUTE.

After a city, as it had charter right to do, had made its assessment roll for 1918 by copying the state assessment roll, it was without authority to supplement the assessment roll by adding plaintiff's theater, under Act No. 69 of 1908, providing that, if any property shall be omitted, when discovered it shall be assessed by the assessor or tax collector, etc.; such act not being applicable to a town or city.

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by the Elks Theater Company against the City of New Iberia. From the judgment, defendant appeals. Affirmed.

L. O. Hacker, of New Iberia, for appellant.  
Burke & Smith, of New Iberia, for appellee.

**PROVOSTY, J.** After the city of New Iberia had made its assessment roll for the year 1913, by copying the state assessment roll, as it had the right, under section 85 of its charter (Act No. 187 of 1910) to do, it added to it the theater of the plaintiff fraternal benevolent association. The plaintiff, by this suit, enjoined the assessment, on the grounds that its said theater is exempt from taxation, under article 230 of the Constitution, as belonging to a fraternal organization; and that the city was without authority to supplement the assessment roll in that manner.

[1] While said theater is used for the fraternal purposes of the plaintiff, its hall or auditorium, is also used for picture shows and theatrical performances, and rooms in the building are leased as stores, from which a revenue of some \$1,500 is derived yearly. It therefore comes under the proviso, "provided, the property so exempted be not leased for purposes of private or corporate profit or income," and, consequently, is not exempt. *Methodist Episcopal Church v. City of New Orleans*, 107 La. 611, 32 South. 101; *Victoria Lumber Co. v. Rives*, 115 La. 996, 40 South. 382.

[2] For authority to supplement the assessment roll in the manner hereinabove stated, the city relies upon Act No. 69, p. 84, of 1908, by which the state officers are authorized to supplement in that manner the state assessment for state taxes; but that act is entitled "An act to provide an annual revenue for the state \* \* \* by," etc., and in none of its terms is applicable to a town or city. True it provides as follows:

"That if any \* \* \* property shall be omitted in the assessment of any year, or series of years, or in any way erroneously assessed, the same, when discovered, shall be assessed by the assessor, or tax collector for the whole period of which the same may have been omitted or

improperly assessed, and shall be subject to the state, parish, municipal and levee taxes, which have been, or may hereafter be assessed against said property in accordance with law."

But the assessor and the tax collector here referred to are evidently the assessor and the tax collector mentioned in other parts of the act, and not the assessor and the tax collector of the towns and cities of the state. As to the latter officers, legislation with reference to their powers and authority must be sought for in the charters of their respective towns and cities; and the charter of New Iberia confers no such authority or power upon the assessor or the tax collector of the city.

The judgment maintaining the injunction is affirmed.

(78 South. 433)

No. 21325.

**FINCHER v. CHICAGO, R. I. & P. RY.**  
CO. et al.

(April 1, 1918.)

(*Syllabus by Editorial Staff.*)

**NEGLIGENCE** §23(1) — **INJURIES TO CHILD**  
**NEAR TRACK**—"ATTRACTIVE APPLIANCE DOCTRINE."

A railroad was not liable, under the attractive appliance doctrine, for death of a little girl by drowning in a pool of water on the railroad's right of way, resulting from the dropping of drainage water from the culvert which let it through the roadbed, such pool being invisible from the street, on the other side of the tracks, and down an embankment, not accessible or even visible to children, except by going on the tracks, since, for application of the attractive appliance doctrine, the thing must be so situated as to lure or attract children where they have a right and are likely to be, and the danger must be so obvious that a due regard for the safety of children necessitates taking precautions for their protection.

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

Suit by T. E. Fincher against the Chicago, Rock Island & Pacific Railway Company and others. From judgment for plaintiff,

defendants appeal. Judgment set aside, and suit dismissed.

Thomas S. Buzbee, of Little Rock, Ark., and Barksdale & Barksdale, of Ruston, for appellants. R. W. Oglesby, of Winnfield, for appellee.

PROVOSTY, J. The railroad of the defendant company traverses the town of Jonesboro north and south. The built-up part of the town is on the east side of the railroad. On the west side is a sawmill plant, of which the town is the outgrowth. The east side is high or hilly ground, whereas the west side is flat, and the railroad runs along the slope of the high ground. The streets of the town at right angles with the railroad go no further than the right of way of the railroad.

The little four year old daughter of the plaintiff, who lived with her grandmother (plaintiff having remarried, and living in Texas), left her grandmother's house to go to her aunt's on the opposite side of the street, to get her hat. She was next seen, some three squares from her grandmother's house, going down the street towards the railroad, and some 35 feet from it, leading by a string tied to her arm a little boy younger than herself. The next the two children were heard of was when, a few moments later, the boy came, crying and all wet, without the girl. On investigation it was found that they had strayed across the double tracks of the railroad and down the east side of the embankment of the railroad, and that the girl was drowned in a pool of water there. This pool was about 10 feet by 15 in area, and 4 to 5 feet deep, and was caused by the earth being washed away by drainage water from the town dropping from a culvert which let it through the roadbed.

When the children reached the head of the

street they had level ground to walk on to the railroad depot at their left and to the railroad tracks in front of them and to opposite this pool on their right. The distance between the depot and the pool is about 200 feet; and the distance between the head of the street, or line of the right of way, and the first track is about 40 feet.

Having allowed this pool to remain there, where children, fond as they are known to be of playing in water, might be attracted to it and get drowned, is charged as negligence on the part of the defendant company. The doctrine of the Turntable Cases, is invoked.

Defendant answers that this hole was on the right of way, in an out of the way place, where children were not in the habit of going; that it could not have been seen by these children until they had crossed the first railroad track and gone upon the second track; that these railroad tracks were no place for children to be; that so far as danger is concerned the two ponds of the sawmill company near by were just as attractive to children, if not more so; that for going to this pool the children had to descend the embankment of the roadbed some 6 to 8 feet; and, finally, that the responsibility for the death of this child lies with the grandmother, who suffered her to wander off and by an unfortunate chance get to this hole.

There is really no dispute as to the facts, the question being as to whether under the foregoing circumstances the turntable or attractive appliance doctrine is applicable.

Everybody knows, and several witnesses in this case testify, that a pool of water is attractive to children; but, for the application of said doctrine, it does not suffice that the thing from which the injury has resulted was in itself attractive, or, in other words, was such that the instincts of children would prompt them to meddle, or play with or in it, but it must be so situated as

to lure or attract children from the safe place where they have a right and are likely to be, and induce them to enter the premises where the attraction is in order to meddle or play with or in it, and the danger of its so alluring children must be so obvious that a due regard for the safety of the children would suggest to a man of ordinary prudence the necessity of taking precautions for their protection. 19 L. R. A. (N. S.) 1112 to 1173; 47 L. R. A. 1101 to 1106; 29 Cyc. 445, 448; Elliott on Railroads (2d Ed.) § 1259, p. 617.

True, in this case, this pool was not very far from the depot, and not very far from the street, but it was on the other side of the railroad tracks, and down an embankment, not within sight from the street, nor until the first track of the railroad had been crossed. Not accessible, or even visible, therefore, to children except by going upon the railroad tracks, a place certainly where children had absolutely no right to be, where they would be incomparably in greater danger than when within sight of, or even access to, a pool of water. In a note to Elliott, *ubi supra*, is the following:

"Certainly this must be true where the child could not have been attracted by it until after he became a trespasser" (citing several cases).

In this case the child could not have been attracted by this pool until after she had become a trespasser.

It is noteworthy that while plaintiff charges defendant with negligence for not having known of the danger to children from this pool, and guarded against it, the thought of this danger does not seem to have occurred to any one, prior to this accident, though the existence of the pool was known to several persons, including the mayor of the town.

Judgment set aside, and suit dismissed, at plaintiff's cost.

(78 South. 435)

No. 21313.

GRANGER v. ILLINOIS CENT. RY. CO.

(April 1, 1918.)

(*Syllabus by Editorial Staff.*)

RAILROADS — 398(1) — INJURY ON TRACK — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In an action for damages for the death of plaintiff's husband alleged to have been killed by the reckless, wanton, and negligent act of defendant railroad, evidence held not to show that death was caused by the defendant's negligence.

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; S. Schofield Rownd, Judge.

Action by Mrs. M. P. Granger against the Illinois Central Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Richardson & Kemp, of Independence, for appellant. Hunter C. Leake, of New Orleans, and Bolivar E. Kemp, of Amite (Blewett Lee and R. V. Fletcher, both of Chicago, Ill., of counsel), for appellee.

LECHE, J. Plaintiff appeals from a judgment in favor of defendant, refusing her demand for damages in the sum of \$16,500, alleged to have been suffered by her as a result of the death of her husband, whom she charges to have been killed by the reckless, wanton, and negligent act of defendant.

The record shows that the late George Granger was living approximately a half mile southeast of the McMichael crossing, just north of Shiloh, a flag station on the line of defendant railroad company about 2 miles south of Amite in the parish of Tangipahoa; that his wife, the plaintiff in this suit, being ill and in need of medical attention, Granger left his home about 9:30 o'clock in the evening of June 15, 1914, to go to Amite in order to secure the services of a physician. Granger did not return, and

about 2 o'clock the next morning he was found in the throes of death, his body in a pitifully mangled condition, lying some 23 feet east of the railroad tracks and 28 feet north of the McMichael crossing. He died a few hours later without regaining consciousness. The engineer and fireman of the fast mail train, which, on its way north, passed the place where Granger was found, 15 or 20 minutes after the latter had left his home, and which is supposed to have killed him, were examined as witnesses, and neither one saw Granger or knew that he had been killed, so that the manner in which Granger came to his death is entirely a matter of conjecture. Blood stains and loose splinters on the boards of the frame which incloses a cattle guard, located between the crossing and the place where the deceased was lying, indicate that he must have been violently hurled from the railroad track; but, on the other hand, no blood marks were found or seen on the engine which is presumed to have struck him.

Plaintiff's theory is that Granger approached defendant's tracks in order to cross them at McMichael crossing, and that, owing to a thick growth of weeds along the right of way, he was unable to see the train in time to avoid being run over. That is merely supposition and theory, for it seems beyond human credulity that an active young man, in the possession of all his senses and faculties, could, in the darkness and stillness of the night, approach a well-known railroad track and not see or hear a brightly illuminated train, equipped with a glaring headlight, coming towards him with the noise and din of its ponderous mass of metal and machinery rolling at a speed of 45 miles per hour. The testimony of Messrs. Geo. P. McMichael, P. P. McMichael, owner of lands on each side of the track, and of Mr. John F. Baham, who all reside near the McMichael crossing, shows that the roadway to the

grade at that crossing is sufficiently high to enable a person, at any time, coming towards the defendant's tracks from the east, to easily see, above the scattered weeds along the right of way, a train at a distance of one quarter mile. Plaintiff's theory of this unfortunate accident is then untenable and not compatible with the evidence in the case.

Plaintiff's misfortune is most regrettable; but, in the absence of proof showing that it was caused by the negligence of defendant, the court is without right or authority to grant the relief which she asks.

Judgment affirmed.

(78 South. 435)

No. 21378.

HENDERSON, Sheriff, v. SOUTHWESTERN TRACTION & POWER CO.

(April 1, 1918.)

(Syllabus by the Court.)

1. STREET RAILROADS ~~69~~—STATE LICENSE TAX—STATUTE.

Under Act No. 171 of 1898, § 10, pp. 406, 407, as amended by Act No. 103, of 1900, p. 163, a corporation engaged in operating an electric railroad in any city or town of this state having less than 50,000 inhabitants is liable for an annual state license, based upon its gross annual receipts as therein provided, and is not relieved of that obligation by reason of its doing an interurban business, whether the same be greater or less than the business done in the cities or towns between and in which it operates.

2. STREET RAILROADS ~~69~~—STATE LICENSE TAX—BURDEN OF PROOF—INTEREST AND ATTORNEY'S FEES.

The law (Act No. 171 of 1898, pp. 417, 418, § 19) makes provision whereby the tax collector may obtain the necessary information and enforce the payment of the license tax thereby imposed, and the burden rests upon him to establish the basis for the judgment which he seeks in such a case. Where, however, it is shown that any business is conducted in a particular city or town, he is entitled to a judgment for \$15, as the annual license for operating an electric railroad therein, though the amount of the gross annual receipts from such business is not shown, and the right to collect the license carries with it the right to collect interest and attorney's fees.

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Proceeding by George Henderson, Sheriff and ex officio Tax Collector, against the Southwestern Traction & Power Company. Judgment for defendant, and plaintiff appeals. Judgment annulled, and judgment rendered for plaintiff.

L. T. Dulany, of New Iberia, for appellant. Foster, Milling, Saal & Milling, of Franklin, for appellee.

MONROE, C. J. This is a proceeding by the ex officio state tax collector of the parish of Iberia to compel defendant to pay \$200, with certain penalties, by way of licenses, of \$50 each, for the years 1914 and 1915, for operating an electric railroad for the transportation of passengers within the limits of the cities of New Iberia and Jeanerette, respectively, located in that parish.

Defendant denies liability on the ground that it operates an interurban road between the cities mentioned, and that the business done within their limits is merely incidental to its interurban business. It alleges that, should the court hold otherwise, the license should be based upon the aggregate gross receipts of the two cities, and that but one license should be exacted, and that, should the court hold that a license may be exacted for each city, it should not exceed \$15.

Act 171 of 1898, § 10, as amended and re-enacted by Act 103 of 1900, p. 163, reads:

"Provided, that, for the business of carrying on, operating, or running any horse, or steam, or electric railroad, or both, for the transportation of passengers within the limits of any city or town in this state the annual license shall be three eighths of one per cent. of the annual gross receipts.

"Provided, that, in cities where the population is less than 50,000, there shall be three grades based on actual gross receipts, as follows, viz.:

"First Class—When the annual gross receipts are \$25,000.00, or in excess of that amount, the license shall be \$100.00.

"Second Class—When the annual gross re-

ceipts are less than \$25,000.00, and more than \$3,000.00, the license shall be \$50.00.

"Third Class—When the gross annual receipts are \$3,000.00, or less, the license shall be \$15.00."

The two cities have each less than 50,000 inhabitants; hence, if defendant is liable for the licenses, it falls under one or the other of the three above-stated classifications.

[1] It appears from the evidence that it operates an electric road extending from the north side of and through New Iberia to the south side of and through Jeanerette, using the main street of each of the cities; that it has a franchise, of which it has not availed itself, to make use of other streets in New Iberia and, probably, a similar franchise in Jeanerette; that to the extent of its present trackage it does a local business in each city; that is to say, its cars stop at each street corner to take on and let off passengers, and may stop between the corners; that a uniform fare of five cents is charged for any distance within the limits of the cities; that though usually the cars make their trips from the terminus of the road in one city to the terminus in the other, an exception is made during the baseball season, in New Iberia, upon which occasions the cars run to the park and back, through New Iberia, until the crowds are carried out or brought home, without going, or in addition to going, to Jeanerette. It may be that the General Assembly was not thinking of defendant or its road when the act of 1871 was passed; in fact, it is quite likely that the road was not then built; and it may be that defendant was not thinking of the act of 1871 when it built its road in such a way, as we imagine, as to get a considerable share of local business both in New Iberia and Jeanerette. The fact remains that it is operating an electric railway within the limits of each of those cities and within the terms of the statute, and that it owes a license for each city.



The evidence falls to show the amount of its gross receipts, and defendant seems to have been so taken by surprise that it is said that it may be compelled to adopt a different method of bookkeeping in order to find out what its receipts in the two cities amount to. The learned counsel for plaintiff argues that, inasmuch as the information is, or should be, in defendant's possession, the burden of producing it rests upon defendant, and deduces therefrom that, by reason of its failure in the production, the court is to assume that the gross annual receipts in each city are the same and fall within one classification, out of a possible three, rather than either of the others. But we are not referred to the authority for that saying. The petition alleges that defendant owes \$50 a year for each city, for two years' licenses, and, as showing why it is so indebted, counsel point to the provisions of the statute which impose the tax upon companies doing business in cities of less than 50,000 inhabitants, and fix the amount with reference to their gross annual receipts as follows, to wit: \$100 where such receipts are \$25,000 or more; \$50 where they are less than \$25,000 and more than \$3,000; and \$15 where they are less than \$3,000; and, having followed that by the introduction of testimony showing that the cities in question contain, each, less than 50,000 inhabitants, and that defendant is doing business in each city and deriving some revenue therefrom, it appears to us that he should go further, in order to recover an annual license of as much as \$50, and show the amount of the revenue derived from the business in each city. It is no doubt true that, where a defendant alone possesses the information necessary to the making out of a plaintiff's case, the plaintiff may, at some risk, extract it from him, but he is not usually expected to furnish it of his own accord. For the purposes of cases of this kind the law seems to contemplate that the tax

debtor shall make a sworn return, but our inspection of act 171 of 1898 and its amendments has failed to disclose a specific provision to that effect. Section 19 of that act (page 417) declares:

"That the business, \* \* \* for the purpose of calculating licenses, shall be ascertained by the tax collector in the sworn statement of the person \* \* \* interest, \* \* \* his \* \* \* agent or officer, made before the tax collector or his deputy; provided, that, if the tax collector is not satisfied with the said sworn statement, he shall traverse the same by a rule. \* \* \* On the trial of said rule, the books and written entries and memoranda of said person \* \* \* shall be brought into court, and subjected to the inspection and examination of the court, the officer who took the rule, and such experts as he may employ or the court may appoint," etc.

Act 170 of 1898 (providing for property taxation) § 14, pp. 353, 354, provides:

"That it shall be the duty of each taxpayer, parish of Orleans excepted, to fill out a list of his property, \* \* \* and he shall make oath thereto \* \* \* and return the same to the assessor \* \* \* and any refusal, neglect or failure \* \* \* to comply with this provision \* \* \* shall act as estopping the taxpayer from contesting the correctness of the assessment list filed by the assessor."

[2] But, if we should assume that the "sworn statement" referred to in Act 171 is the one provided for in Act 170, it remains that Act 171 provides no penalty for or failure to return such statement, other than as may be found in section 20, as above quoted. It is shown here that New Iberia has a population of about 7,500, and Jeanerette a population of about 3,000. It is hardly to be supposed therefore that defendant's gross annual receipts are the same in each city, and as it is not shown what they are in either (plaintiff not having called for the "books," etc.), there is no basis upon which to rest a judgment against either for \$50 a year, any more than for \$100, but it is shown that defendants get some receipts from its business in each, and as it is liable for a license of \$15 a year in each, upon the basis of gross annual receipts amounting to "\$3,000.00, or less," it is evident that plaintiff is entitled

to recover upon that basis, which, under sections 26 and 28 of the act (page 420), also entitles him to recover interest at the rate of 2 per cent. per month from March 1st of the year in which the license fell due, and 10 per cent. as attorney's fees, upon the aggregate amount of the license and penalties collected and turned over to the collector.

It is therefore ordered and decreed that the judgment appealed from be annulled, and that there now be judgment in favor of the plaintiff herein and against the defendant in the sum of \$60, with interest upon \$30 thereof, at the rate of 2 per cent. per month from March 1, 1914, and like interest upon a like sum from March 1, 1915, until paid, and 10 per cent. upon the aggregate amount of principal, interest, and costs, as attorney's fees. It is further decreed that defendant pay all costs.

(78 South. 437)

No. 22942.

STATE v. SERVAT.

(April 1, 1918.)

(*Syllabus by Editorial Staff.*)

1. COURTS ~~224~~(7)—SUPREME COURT—CRIMINAL APPELLATE JURISDICTION — FINE IMPOSED BY MUNICIPALITY.

The Supreme Court could have jurisdiction of an appeal from a judgment of a city criminal court, convicting defendant of the violation of an ordinance of the sewerage and water board of the city of New Orleans, and fining her \$20, only on the hypothesis that the appeal involved the legality or constitutionality of a fine imposed by a municipal corporation.

2. MUNICIPAL CORPORATIONS ~~175~~—SEWERAGE AND WATER BOARD.

The sewerage and water board of the city of New Orleans, a mere agency for the more convenient administration of the sewerage and water business of the city, is not a "municipal corporation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

Appeal from Second City Criminal Court of New Orleans; Alex C. O'Donnell, Judge.

Mrs. J. Servat was convicted of a violation of an ordinance of the Sewerage and Water Board of the City of New Orleans, and she appeals. Appeal dismissed.

Alfred Bonomo and Richard Dowling, both of New Orleans, and Eugene S. Hayford, for appellant. J. Arthur Charbonnet, Asst. Dist. Atty., and Walter L. Gleason and Edgar H. Bloch, all of New Orleans, for the State.

PROVOSTY, J. By Act No. 6 of the Extra Session of 1899 the sewerage and water board of the city of New Orleans is authorized to make certain regulations, and the violation of any of the regulations so made is made punishable by a fine not exceeding \$25 or by imprisonment not exceeding 30 days.

By Act 270 of 1908, the said board is authorized to make further regulations, one of which is to cause the removal of all cisterns from improved premises; and is authorized to enforce the regulations so made by the infliction of the penalties provided for by the said Act 6 of the Extra Session of 1899.

Under authority of this act of 1908, the said board, on July 13, 1916, adopted a resolution providing that:

"After the 1st day of August, 1916, it shall be the duty of the owners of each inhabited premises in the city of New Orleans, which is connected with the water system of the sewerage and water board, to cause the demolition and removal from the premises of all cisterns," etc.

To an affidavit against her for violation of said ordinance and statute, the defendant pleaded as follows:

"That the allegations in said affidavit are not sufficient in law and do not charge respondent with any offense or crime under any law of the state of Louisiana; and therefore respondent is not bound by the law of the land to answer the same."

This plea having been overruled, the defendant excepted to the ruling on a number of grounds, including that of the unconstitutionality of said ordinance, and, from an ad-

verse judgment and a fine of \$25 has appealed to this court.

[1, 2] In coming to this court with the appeal the learned counsel of defendant have assumed that the case involves the legality or constitutionality of a fine imposed by a municipal corporation, for it is only on that hypothesis this court could have jurisdiction of the case; but it does not. Whether the question of the illegality or unconstitutionality of the said fine could be considered to have been raised by the said demurrer, and therefore to be involved in the case, and whether the said fine has been imposed by said board, and not by the said acts of the Legislature, are contested points in the case; but, waiving these points, the said board is certainly not a municipal corporation. In *State v. Hagen*, 136 La. 868, 67 South. 935, it was debated whether even a parish is a municipal corporation; and certainly the said board is not, which is a mere agency for the more convenient administration of the sewerage and water business of the city of New Orleans. This court is therefore without jurisdiction of the case.

Appeal dismissed.

(78 South. 438)

No. 21228.

TYER v. GULF, C. & S. F. RY. CO.

(April 1, 1918.)

(*Syllabus by Editorial Staff.*)

1. NEGLIGENCE ~~§~~ 83—"LAST CLEAR CHANCE"—APPLICATION OF RULE.

In order to enforce the humanitarian doctrine of "the last clear chance," it must appear that plaintiff has clearly shown that defendant, after seeing the danger, could by the exercise of ordinary care have avoided the injury, or, if defendant did not see the danger, it must appear that plaintiff has clearly shown that defendant might by the exercise of ordinary care have seen the danger in time to avoid the injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

2. NEGLIGENCE ~~§~~ 4—"ORDINARY CARE."

"Ordinary care" is not a constant, but a varying, condition, dependent upon the circumstances of each particular case and proportioned to the dangerous nature of the instrumentality employed and the probability of injury that may arise.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

3. RAILROADS ~~§~~ 381(3)—INJURY ON TRACK—RECOVERY—LAST CLEAR CHANCE.

Where a person recklessly places himself in a situation of great and imminent danger, as by lying down on a railway track in such a position, at such a time, and at such a place that the locomotive engineer, while exercising ordinary care, could not recognize and discern his presence in time to avoid running over him, his widow and heirs may not recover from the railroad company damages resulting from his death.

Appeal from Fifteenth Judicial District Court, Parish of Allen; Winston Overton, Judge.

Action by Mrs. Sarah B. Tyer against the Gulf, Colorado & Sante Fé Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

S. N. Young, of Oberlin, for appellant. Pujo & Williamson, of Lake Charles, for appellee.

LECHE, J. Plaintiff prays for damages in the sum of \$25,000, alleged to have been suffered by herself and her minor children as a result of the death of her husband, which is charged to have been caused by the negligence of defendant.

The district court rendered judgment in favor of defendant, and plaintiff prosecutes this appeal.

Plaintiff's deceased husband, J. G. Tyer, a blacksmith employed by the Industrial Lumber Company, at Elizabeth, La., left Oakdale, in the parish of Allen, La., in the afternoon of June 14, 1911, presumably to go about eight miles to his work at Elizabeth. He undertook his journey on foot on defendant's railroad track, and when approximately halfway, about 7:50 o'clock in the evening, he was run over and killed by a freight train of defendant going in the direction of Oakdale. At the time of the accident, Tyer

was lying down flat on his stomach, lengthwise inside the track, near the left-hand rail, with his feet towards the incoming train. The condition of the atmosphere is described as smoky, semidarkness had spread over the wooded swamp through which the train was running, and a regulation headlight on the engine was illuminating the way. The locomotive and tender and three cars passed over him, and, after the train was stopped, his lifeless body was extricated from under the forward truck of the fourth car.

The evidence indicates that the deceased was under the influence of whisky, and this may account for the perilous position in which he had thus recklessly placed himself.

The engineer testified that he first saw a dark object on the track about 100 feet ahead, but only recognized it as a human body when within 60 or 70 feet from it; that his train, consisting of 20 cars, 18 of which were loaded, was running about 18 to 20 miles an hour, and could only be stopped in a distance of 250 to 300 feet. He further testified that the place of the accident was in the piney woods, where one would have no reason to suspect the presence of a human being, especially in that position; that the track was straight; and that the equipment of the train was in first-class condition. He says that there was some grass on the track, and that, although he was looking ahead, he could not under existing conditions have seen the deceased any sooner nor avoid running over and killing him.

[1, 2] Several experts on behalf of each party were sworn as witnesses, and their testimony on the whole supports that of the engineer and satisfies us that the engineer did exercise ordinary care.

[3] This case is very similar to that of *Mrs. Sadie Rogers v. Louisiana Railway & Navigation Co.*, 78 South. 237,<sup>1</sup> lately decided

<sup>1</sup> Ante, p. 58.

by us; and we hold here, as we did in that case, that, plaintiff having failed to clearly show that the accident might have been avoided by the exercise of ordinary care on the part of the locomotive engineer, after the danger of the situation was, or should have been by him, discovered, she is not entitled to recover.

The judgment appealed from is affirmed.

(78 South. 439)

No. 21215.

STATE ex rel. HODGE, Dist. Atty., v.  
OLIVER, Sheriff and Tax Collector.

(April 1, 1918.)

*(Syllabus by the Court.)*

APPEAL AND ERROR §123—DECISIONS REVIEWABLE—APPELLATE JURISDICTION—DISMISSAL.

Where the transcript discloses a verdict but no judgment pursuant thereto, either rendered or signed, no appeal lies; the appellate jurisdiction of this court does not attach; and an attempted appeal will be dismissed.

Appeal from Seventh Judicial District Court, Parish of Richland; J. R. McIntosh, Judge.

Suit by the State, on relation of Tobin R. Hodge, District Attorney of Richland parish, against William T. Oliver, Sheriff and Tax Collector. From a verdict for defendant, relator appeals. Appeal dismissed.

Tobin R. Hodge, Dist. Atty., of Rayville, in pro. per. Hudson, Potts, Bernstein & Shofars, of Monroe, for appellee.

On Motion to Dismiss Appeal.

MONROE, C. J. This suit was brought by the district attorney of Richland parish for the removal of the sheriff of that parish.

The transcript of appeal, filed in this court on March 15, 1915, discloses a verdict, reading:

"We, the jury, find the defendant, W. T. Oliver, guilty of nonfeasance, but not to the

extent to justify his impeachment or removal from office of sheriff of Richland parish."

The transcript does not disclose any judgment, rendered upon the verdict, nor motion, nor order, nor bond, of appeal; nor the name of the presiding judge.

Counsel appearing for defendant move that the appeal be dismissed on the ground "that there is no judgment in the case from which an appeal can, or could be, taken, none such at the time the appeal herein was taken, none ever having been signed and entered by the presiding judge of the court a qua, and that therefore this court is without jurisdiction of the appeal."

The motion is well founded. C. P. 541, 565; Railroad Co. v. Construction Co., 113 La. 409, 37 South. 10; Hauch v. Drew, 116 La. 488, 40 South. 847; Mitchell v. Creosoting Co., 123 La. 957, 49 South. 655; Hanchey v. Railroad Co., 135 La. 352, 65 South. 487.

The appeal herein is therefore dismissed.

(78 South. 439)

No. 21447.

SANDERS et al. v. TREMONT LUMBER CO.

(April 1, 1918.)

(Syllabus by the Court.)

ESTOPPEL — 29(1)—BY DEED.

While a defendant in a petitory action, who holds by a title derived through plaintiff, may repudiate that title and claim by a new title derived from another person who was the real owner, the rule is well settled that he cannot assail or impugn the title which he holds from plaintiff when his claim of ownership rests entirely upon the validity of that title.

Appeal from Fifth Judicial District Court, Parish of Winn; Cas Moss, Judge.

Suit by C. M. Sanders and others against the Tremont Lumber Company. Decree for plaintiffs in part and for defendant in part, and plaintiffs appeal. Judgment amended and affirmed.

Huey P. Long and Earl E. Kidd, both of Winnfield, for appellants. Stubbs, Theus, Grisham & Thompson, of Monroe, and R. W. Oglesby, of Winnfield, for appellee.

LECHE, J. Plaintiffs sue as heirs of their mother, to recover from defendant the undivided half of certain property acquired by their father, during his marriage with their said mother and sold by him, without authority, after her death. The district court refused their demand as to one of the properties in suit, viz.: The southwest quarter of section 8, in township 12 N., R. 1 west, and this appeal, taken by them, is restricted to their claim to that property.

Defendant, at the time of the institution of this suit, and at the time it filed its original answer, owned the south half and the merchantable timber on the north half of the said southwest quarter section, by virtue of titles emanating from the plaintiff's father. But a few days prior to the trial of the case, on March 11, 1915, defendant again bought the same property from the author in title of plaintiffs, filed a supplemental answer, and pleaded this newly acquired title. Plaintiffs then filed a plea of estoppel under which they contend that defendant could not assail the validity of the title which it had originally acquired through mesne conveyances from their father.

The record shows that one Charley Rolan entered the quarter section of land in dispute as his homestead, that he made final proof of his entry on December 12, 1899, and that a final certificate was issued to him on January 8, 1900. The property was sold by Charley Rolan to R. A. Sanders on December 12, 1899, the same day that final proof was made. Sanders had married plaintiffs' mother in the year 1881, and she died September 11, 1900. Sanders sold all the timber on the quarter section on February 25, 1902, and sold the naked land composing the north half

of the quarter section on April 10, 1902. By deed acknowledged December 4, 1911, he then sold the remainder of the land forming the south half of the quarter section.

Defendant, in its supplemental answer, charges that Rolen sold to Sanders prior to making his final proof, and that said sale was void, as being a sale of land still belonging to the United States, and to which he had not yet acquired title.

Unless defendant pleaded a new title, acquired from some other person, it had no interest in attacking the transfer by Rolen to Sanders, and could not impugn that title. It made no attempt to offer evidence as to the time of day at which the final proof was completed by Rolen and the time of day at which the sale to Sanders was executed. These two transactions took place on the same day, December 12, 1899. The court will not presume that Rolen first sold the property and then perjured himself in making final proof. The legal presumption of *omnia rite acta*, etc., on the contrary, is that Rolen must have completed his final proof before conveying the land to Sanders.

On the trial of the case, the judge, notwithstanding timely objection on the part of plaintiffs, further permitted defendant to offer testimony to show that Rolen had not resided continuously upon the land entered by him as his homestead, and that by a verbal agreement of exchange with one W. P. Allen, he had abandoned the same for more than six months prior to making his final proof, in violation of sections 2291 and 2297, United States Revised Statutes (U. S. Comp. St. 1916, §§ 4532, 4552). The judge's ruling was, in our opinion, contrary to the well-settled rule invoked by plaintiffs that a defendant in a petitory action may not attack or as-

sail the title of one who is the common author of both parties, as title in some one else is as fatal to defendant as it is to plaintiffs. Defendant could have no possible interest in avoiding Rolen's homestead rights. That is a matter which only concerned the United States government. If Rolen's title was based upon perjury, its infirmity or invalidity was not cured by time, but continued up to the moment that defendant obtained from him the conveyance of March 11, 1915, which it pleaded in its amended or supplemental answer. The title thus obtained by it from Rolen on March 11, 1915, was not a new title, but the same title which it had already derived through plaintiffs' father. Plaintiffs' objection to the admissibility of that evidence should have been sustained (*Gallagher v. Conner*, 138 La. 641, 70 South. 539), and for the same reason defendant should have been held estopped from pleading the matters alleged in its supplemental answer attacking the title of Rolen, common author of plaintiffs and of himself.

For these reasons, the judgment appealed from is amended by recognizing plaintiffs as owners of the undivided half of the timber on the north half of southwest quarter of section 8, township 12 north, range 1 west, Louisiana meridian, and as owners of the undivided half of the south half of the southwest quarter of section 8, township 12 north, range 1 west, Louisiana meridian, together with the timber thereon, and by maintaining and perpetuating the injunction herein issued in so far as it applies to the southwest quarter of said section 8, and by further condemning defendant to pay all costs; and, as thus amended, it is ordered that the judgment appealed from be affirmed, at the costs of defendant and appellee.

(78 South. 441)

No. 21259.

HYDE et ux. v. TEXAS &amp; P. RY. CO.

(April 1, 1918.)

*(Syllabus by Editorial Staff.)*1. RAILROADS ~~398~~(3)—INJURY ON TRACK—  
NEGLIGENCE.

In an action for damages for the death of plaintiffs' son, who was run over by defendant's train while he was asleep beside the track, evidence held not to show that the engineer was negligent in failing to see deceased in time to avoid the accident.

2. RAILROADS ~~367~~—INJURY ON TRACK—  
FAILURE TO WHISTLE.

In such case, even though the engineer's failure to blow the whistle when he saw deceased asleep beside the track was an error of judgment, he would not be considered at fault in such an emergency.

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin K. Schwing, Judge.

Action by William H. Hyde and wife against the Texas & Pacific Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hundley & Hawthorn, of Alexandria, for appellants. Albin Provosty, of New Roads, and Howe, Fenner, Spencer & Cocke, of New Orleans, for appellee.

O'NIELL, J. [1] The plaintiffs have appealed from a judgment rejecting their demand for damages for the death of their son. He was run over and fatally injured by a passenger train of the defendant company, while he was asleep, with two other boys, beside the railroad track.

The basis of the plaintiffs' claim is their averment that the engineer of the train was guilty of negligence in failing to see the boys beside the track in time to avoid the accident, and in failing to sound an alarm when he did see them.

The plaintiffs' son was 14 years of age, and the other boys were near that age. As their negligence in lying down so close to

the railroad track ended when they fell asleep, the question of liability depends upon whether the engineer had an opportunity to avoid injuring them. Our conclusion from the evidence is that he had not. Clouds of dust and a bank of cinders prevented his seeing the boys, or recognizing that they were living beings, until it was too late to stop the train before reaching them. The engineer did not then sound an alarm, because he believed the boys were in the clear, and he feared that arousing them suddenly might cause them to move involuntarily into danger. He applied the emergency brake and stopped his train as quickly as it could have been stopped, at the same time waiving to the boys to remain lying down. When the train had stopped, one of the boys was yet asleep. Another had slid away from the track. The plaintiffs' son had been struck by some projecting part of the train and was unconscious.

[2] We doubt that the failure of the engineer to blow the whistle when he saw the boys asleep beside the track was an error of judgment; and, if we thought it was, we would not consider it his fault in such an emergency.

The judgment appealed from is affirmed.

(78 South. 441)

No. 22967.

STATE v. LEROY.

(April 1, 1918.)

*(Syllabus by Editorial Staff.)*DISORDERLY HOUSE ~~12~~ — INDICTMENT —  
STATUTES.

An indictment charging that defendant "unlawfully did operate a disorderly house in Shreveport, Caddo parish, La., by then and there keeping, renting, and operating a room in the Youree Hotel for the purpose of assignation and prostitution, which room and house aforesaid, is outside the limits fixed by municipal ordinance for houses of that character," charged the crime denounced by Rev. St. § 908, providing that whoever shall be guilty of

keeping any disorderly inn, tavern, ale house, tippling house, gaming house, or brothel, shall suffer fine or imprisonment, or both, as amplified by Act No. 199 of 1912, § 1, providing that the use of any room or any part of a building for any of the purposes enumerated shall constitute such room or such part a disorderly house.

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Miss O. Leroy was indicted for unlawfully operating a disorderly house, and, from judgment sustaining demurrer to the indictment, the State appeals. Judgment set aside, and case remanded.

A. V. Coco, Atty. Gen., Lal C. Blanchard, Dist. Atty., of Shreveport (Vernon A. Coco, of New Orleans, of counsel), for the State. Levy & Crane, of Shreveport, for appellee.

**PROVOSTY, J.** The question in this case is as to whether the indictment charges an offense. It reads:

"Unlawfully did operate a disorderly house in Shreveport, Caddo parish, La., by then and there keeping, renting, and operating a room in the Youree Hotel for the purpose of assignation and prostitution, which room and house aforesaid is outside the limits fixed by municipal ordinance for houses of that character."

Section 908 of the R. S. reads:

"Whoever shall be guilty of keeping any disorderly inn, tavern, ale house, tippling house, gaming house, or brothel, shall suffer fine or imprisonment, or both, at the discretion of the court," etc.

Act No. 199, p. 395, of 1912, § 1, reads:

"Any house of public entertainment, or a public resort, or open to the public, conducted in such a manner as to disturb the public peace and quiet of the neighborhood; \* \* \* or any house used for purposes of prostitution or assignation outside the limits fixed by municipal ordinance for houses of that character; provided, that the use of any room, or any part of a building for any of the purposes, or in any of the ways hereinabove enumerated, shall constitute such rooms or such part a disorderly house."

The indictment appears to us to charge the crime which said section 908, as amplified by said act 199, denounces.

The judgment appealed from, which sustained a demurrer to the indictment, is set aside, and the case is remanded for trial.

(78 South. 442)

No. 21312.

ARNOLD et al. v. SAUER.

(April 1, 1918.)

(*Syllabus by Editorial Staff.*)

**TAXATION** ~~67~~734(7)—**SALE**—**NOTICE OF DELINQUENCY.**

Where no notice of delinquency was served on the owner, the tax sale was a nullity.

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; W. S. Rownd, Judge.

Suit by J. B. Arnold and H. E. Carroll against Mrs. Lillian Thompson Sauer. From judgment dismissing the suit, plaintiffs appeal. Affirmed.

R. C. & S. Reid, of Amite, for appellants. Miller, Miller & Fletchinger, of New Orleans, for appellee.

**PROVOSTY, J.** The property of defendant, Mrs. Lillian Thompson Sauer, was assessed in 1905, to "Mrs. William Thompson," and was sold to plaintiffs in 1906 under said assessment. Plaintiffs have brought the present suit to confirm the tax title. No notice of delinquency was served on defendant, hence the tax sale was a nullity; and as she has been continuously in the actual possession of the property, prescription cannot be invoked against her.

The judgment dismissing the suit is affirmed.



(78 South. 442)

No. 21435.

CROOM et al. v. NOEL et al.

(April 1, 1918.)

(*Syllabus by the Court.*)

1. EVIDENCE  $\S$ 460(6)—BOUNDARY OF LAND.

If the boundaries of a piece of land are not sufficiently defined in the act whereby it is sold, they may be established by evidence aliunde the act, including, particularly, evidence as to the construction which the parties to the contract have themselves placed on it.

2. ADVERSE POSSESSION  $\S$ 68—PRESCRIPTION—IMMOVABLES—STATUTE.

The ownership of immovables is prescribed for by 30 years' possession under a claim of title without the need of title or possession in good faith, all that is required being that the possession be held in the character of owner, and that it be continuous, uninterrupted, public, and unequivocal; and where it has commenced with the corporeal possession of the thing, it may, if not interrupted, in law or fact, be preserved by external signs by the continuance on the property of vestiges of works erected by the possessor, or by the continued, positive, and even negative intention to possess.

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Suit by C. B. Croom and others against J. S. Noel and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Reynolds & Williams, of Arcadia, and Otis W. Bullock, of Shreveport, for appellants. J. C. Pugh & Son, of Shreveport, for appellee Standard Oil Co. of Louisiana. Alexander & Wilkinson, of Shreveport, for other appellees.

Statement of the Case.

MONROE, C. J. Plaintiffs, as heirs of their parents, Calvin S. and Margaret A. Croom, sue for the recovery of the major interest in a tract of land, containing about four acres, bordering upon Ferry Lake, Caddo parish, which they allege is collusively and unlawfully withheld by defendants J. S. Noel, Atlas Oil Company, and Standard Oil Company, of Louisiana, and which is said somewhat to resemble in contour a horseshoe,

with the toe extended into the lake and the open heel connecting it with the main line of the shore. They seek also to recover \$300,000 as the value of that number of barrels of oil alleged to have been taken by defendants from the land through an oil well known as "Noel No. 1" and \$50 per day for such damages as they may sustain by the further detention of the property.

Defendants Noel and the Atlas Company aver that Noel bought the land in question from plaintiffs' parents in 1876, and has held possession thereof since that time in good faith under the title so acquired; that he leased it to the Atlas Company, to be explored for oil, and that the company, with great expenditure of time, labor, and money, drilled the well mentioned in the petition, to the knowledge and in the presence of a majority of the plaintiffs, who remained silent until the expenditure resulted in the discovery of oil, leaving the possession of defendants undisturbed until the bringing of this suit in 1914; wherefore they plead estoppel and the prescription of 10 and 30 years. The Standard Company denies knowledge of any defect in the Noel title, denies collusion or fraud on its part, alleges that it bought the product of the well "Noel No. 1" from the Atlas Company in good faith, and calls that company and its lessor in warranty. It is shown that plaintiffs include most of the heirs of C. S. and M. A. Croom, who acquired the property in dispute from Timothy Mooring, who acquired it from the government.

Defendant Noel exhibits as a muniment of title a notarial act of date July 25, 1876, reading in part as follows:

"Came and appeared Margaret A. Croom, who, by and with the consent and authorization of her said husband, Calvin S. Croom, \* \* \* declared that they, by these presents, \* \* \* sell, convey, and deliver, with full guarantee of title and with complete transfer and subrogation of all rights and actions of warranty against all former proprietors of the property presently conveyed, unto James S. Noel and Eben C.

Hearne, \* \* \* present, accepting same, the following described property, to wit, a piece of land in Mooringsport upon the bank of the lake upon which is located their steam cotton gin and mill and cotton press in fractional section 25, \* \* \* with privilege of getting into, and out from, said gin and mill house. \* \* \* This sale is made for the consideration of the sum of \$1 cash, the receipt of which is hereby acknowledged."

On January 16, 1877, Eben C. Hearne executed an act conveying with full warranty his undivided half interest in the property so acquired to his coproprietor, Noel, the property being described as:

"A certain piece of land in fractional section 25 \* \* \* in the town of Mooringsport, \* \* \* together with all the buildings and improvements thereon, including mill, cotton gin, and press, and all machinery and appurtenances of the same, being the same property acquired by the parties hereto jointly from Mrs. Margaret A. Croom by an act dated July 25, 1876," etc.

It appears probable that at the time of the foregoing transactions Mooringsport was not an incorporated town, and at all events, that it was not laid off in squares and streets; that C. S. Croom was a merchant and an owner of real estate; and that, in both capacities, he was interested in having added to the business attractions of the place a cotton gin and press and gristmill. Noel, who is not shown to have previously resided there, testifies that Croom was as much interested in the enterprise as he. It is not, therefore, surprising that Croom should have been willing to contribute the site if others were willing to establish and operate the plant, the more especially as the then assessor says in his testimony. "I should think any land right at Mooringsport for building purposes would be worth something like that [\$15 or \$20 an acre]," and it is evident that the land contributed was not in the business center, and that its estimated area at that time was but one or two acres, the quantity available depending upon the stage of the water, which, when high, covered the place where the well Noel No. 1 is now located,

within 100 feet of the site of the gin, from which it follows that the value of the contribution may have been from \$15 to \$40. It appears from the language used in the act, corroborated somewhat by the testimony of Noel, that the improvements were erected before Croom conveyed title to the land; and Noel also testifies, and his testimony is corroborated, that, in order to make room for them Croom moved back his fence, and that he (Noel) built a fence which (possibly connecting with Croom's fence) extended across the neck of the point (if it can so be called) to the lake upon both sides, so that, with the water upon three sides, the point, thereafter called the "gin lot," was inclosed all around. Mr. J. E. Croom, one of the plaintiffs, testifies that it is necessary to fence in a cotton yard where cotton is rolled out after it is ginned and baled in order to keep it from being injured by cattle, and perhaps for other reasons; also that the cotton from the particular gin in question was rolled out of it, "all over the point," but that the place where the well is now located was then "the edge of the water"; the fact being that the greater part of the lot now in dispute has been taken out of the category of what might be called overflowed lands by the improvements since 1876 in the methods of dealing with the waters of the state.

It is undisputed that Noel operated his gin, press, and mill as thus established (also a woodyard, at times) from 1876 until the building through that country of the Kansas City Southern Railroad in 1895 or 1896, when he moved the gin to some point on the railroad, and that during that time his possession of the property was uninterrupted. When he moved he left a fence on the place, a boiler, a cistern, and some old machinery, and had no intention of abandoning his possession. In 1903 he rented the place to J. E. Cochran, who, finding that the fence had disappeared, rebuilt it, thereby with the water front again

inclosing the entire point, which, for 7 or 8 years, he made use of as a pasture and for the raising, so far as it was cultivable, of small crops; about half an acre near the northwest corner having been, and being now, fenced and occupied with Noel's permission by J. H. Lee, who went there in 1911, lives in a houseboat, and raises chickens, and perhaps a few vegetables. C. S. Croom lived until 1896 and his wife until 1897, and neither of them ever questioned Noel's title or right of possession, and members of his family, some of them plaintiffs herein, have lived in Mooringsport since that time and raised no such question until oil was discovered upon the land. To the contrary, on October 10, 1906, all of the heirs united in the execution of an act whereby they conveyed to J. W. Champion—

"the land in section 25, \* \* \* known as the home place of C. S. and Margaret A. Croom, \* \* \* being all of the land lying east and northeast of the lot or land of J. S. Noel and the point of the lake, \* \* \* less the land sold \* \* \* to R. T. Cole and B. F. Logan, \* \* \* and less also the one acre sold \* \* \* to J. S. Noel, the said one acre being known as the old ginhouse lot of said Noel, with all buildings and improvements thereon," etc.

C. B. Croom says in his testimony:

"Well, Judge, if you want me to tell you, my father gave him [Noel] the ginhouse site, and when we sold the first lot there to Champion we sold all except an acre lot where the ginhouse was. Q. Now do you mean that you sold everything except the acre upon which the ginhouse stood? A. No, sir. Q. What did you mean? A. Well, what was inclosed around there; the inclosure around the house there—that is, around the homestead; and Mr. Noel did not get any of that. Q. Mr. Noel had his ginhouse on the point down there, didn't he? A. Yes, sir. Q. And continued to have it there until the Kansas City Southern Railroad was built? A. Yes, sir. Q. Kept it and claimed it? A. Yes, where the ginhouse was. Q. The ginhouse lot? A. Yes, sir. Q. The Kansas City Southern Railroad was built in 1895 or 1896? A. Yes, sir."

At another place in his testimony we find that Mr. Croom was asked concerning a circumstance that seems to have occurred not a

great while before the discovery of oil on the land here claimed. It appears that some one was fencing in the land, or part of it, and that he notified Noel; and, defendants' counsel being curious to know why he did so, his cross-examination ran as follows:

"Q. Why did you notify him that they were fencing up his land if it belonged to you? A. I wanted him to know that they were fencing it up; it was the Croom's heirs land. Q. Well, why did you want to notify Mr. Noel that they were fencing up his land, unless he owned it? A. Well, he had a deed to where the ginhouse stood there, on the ginhouse lot, where the ginhouse was located. Q. Why did you notify him that they were fencing up his land, if it was not his? A. Well, I told him it was mine, too."

Noel corroborated the testimony so given, as to the notice that some one was fencing his land, but, not being asked about it, neither corroborates nor contradicts the statement of the witness, "I told him it was mine, too."

### Opinion.

The following excerpt from the brief filed in this court by plaintiffs' counsel sufficiently discloses the grounds relied on for a reversal of the judgment from which plaintiffs have appealed, to wit:

"First. Plaintiffs contend that the above document (referring to the conveyance to Noel) does not transfer any land for lack of definite description, except that covered by the 'steam cotton gin and mill and cotton press.'"

"Second. Plaintiffs contend that the document, because of the vile price and lack of definite description, was merely a license to build and operate a 'steam cotton gin and cotton press' on Mrs. M. A. Croom's land, with the privilege of using any part of Mrs. Croom's land adjacent to and not covered by the buildings in getting into and out from the said gin and mill house."

The second contention—that Noel acquired only a license to build and operate a gin, etc., on Mrs. Croom's land—does not appear to us to be reconcilable with the exception contained in the first contention, which admits that Noel acquired, in full ownership, at least, the land covered by the "steam cotton

gin," etc.; and the first contention, we think, is founded in too narrow a construction of the description contained in the document to which counsel refer.

[1] The thing sold was partly described as "a piece of land on the bank of the lake," and we construe that part with the other, reading, "upon which is located their steam cotton gin," etc., and, giving effect to both, recognize the grantee as entitled to a piece of land which is, at the same time, on the bank of the lake and has located upon it a steam cotton gin, etc. But the fact that a lot is described as having a building on it does not necessarily imply that it is no larger than the building; and in such case if the boundaries of the lot are not sufficiently defined they may be established by evidence allunde the act of conveyance, including particularly evidence as to the construction which the parties to the contract have themselves placed upon it. C. C. 2474; *Abadie v. Lee Lumber Co.*, 128 La. 1014, 55 South. 658; *Phelan v. Wilson*, 114 La. 813, 38 South. 570; *Robinson v. Atkins*, 105 La. 790, 30 South. 231; *Dickson v. Dickson*, 36 La. Ann. 870.

[2] Beyond that, "the ownership of immovables is prescribed for by 30 years' possession under a chain of title without the need of a title or possession in good faith;" all that is required being that the possession be held in the character of owner, and that it be continuous, uninterrupted, public, and unequivocal, and where it has commenced with the corporeal possession of the thing it may, if not interrupted in law or in fact, be preserved by external signs, by the continuance on the property of vestiges of works erected by the possessor, or by the continued, positive, or even negative intention to possess. C. C. 3500, 3501, 3502, 3442, 3443, 3444. And such possession the defendants herein have shown.

The judgment appealed from is therefore affirmed.

(78 South. 444)

No. 22186.

MARKS v. LOEWENBERG et al.

(Oct. 30, 1916. On the Merits, April 1, 1918.)

(Syllabus by the Court.)

1. COURTS  $\S$ 224(11) — LOUISIANA SUPREME COURT—APPELLATE JURISDICTION—AMOUNT.

The Supreme Court has appellate jurisdiction in all cases where the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed \$2,000.

On the Merits.

2. HUSBAND AND WIFE  $\S$ 36½, 45 — CONTRACTS—STATUTE.

Save in so far as it may have been modified by Act No. 94 of 1916, the law of Louisiana prohibits all contracts between husband and wife, unless expressly excepted, including those which may be entered into whilst the parties are temporarily in another jurisdiction; and a contract between a husband and wife, domiciled in this state, but temporarily sojourning in another state, whereby the wife conveys her paraphernal property to her husband, to be by him held in trust for the benefit, and during the life, of a third person, is within that prohibition.

3. TRUSTS  $\S$ 4 — CONTRACT CREATING TRUST — ENFORCEMENT.

Apart from the incapacity of the parties, such a contract, having for its purpose the establishment of a trust estate, is prohibited and unenforceable in this state.

4. EVIDENCE  $\S$ 448 — PAROL EVIDENCE — BEQUEST OF ANNUITY.

Whilst oral testimony may not be admissible to show that the bequest of an annuity means anything other than the language used fairly imports, it may be admissible in order to enable the court to determine some outside question, as whether an annuity previously allowed to the same beneficiary was intended to be merely secured and continued by means of the bequest, or doubled.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Mrs. Sallie Marks against Mrs. Bertha Loewenberg and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss appeal denied, and judgment appealed from annulled, and judgment rendered for defendants rejecting the plaintiff's demands.

Felix J. Dreyfous and Alfred D. Danziger, both of New Orleans, for appellants. Solomon Wolff, of New Orleans, for appellee.

#### On Motion to Dismiss Appeal.

SOMMERVILLE, J. [1] The plaintiff moves to dismiss the appeal taken by the defendant on the ground:

"That the amount in controversy in the instant case is, on the face of the transcript, less than \$2,000."

Plaintiff alleges in her original petition that the defendants refuse to pay her the sum of \$258, and that they further deny to recognize your petitioner's rights in the premises. She also alleges a contract between her and the mother of the defendants, now deceased, whereby she was to receive the sum mentioned semiannually during the remainder of her natural life; and, further, that the said deceased had, in her last will, made a bequest in her favor, directing that \$13,500 be invested out of the funds of her estate; and that her heirs pay plaintiff the revenues derived from such investment during her, the plaintiff's life; and she prays for judgment accordingly. In a subsequent petition, she alleges that she was 60 years of age, and that under the standard tables of life expectancy she had a life expectancy of 13.27 years, during which time the annuity mentioned in the preceding paragraph will be due her annually, making a total of \$7,414.92, and she asks that the defendants be required to give her a proper bond in the premises. Subsequently, she moved to correct an error, when she stated that she was 60 years of age, alleging that she was really 70 years of age, and that her life expectancy was only nine years, and the amount involved was \$4,644.

There is no error alleged in the above computation, and there is judgment of the district court based on the amount last mentioned.

A mere statement of the case shows that this court has jurisdiction.

Motion to dismiss the appeal is denied.

#### On the Merits—Statement of the Case.

MONROE, Q. J. This action is brought against the children and heirs of Mr. and Mrs. Samuel Loewenberg by the stepmother of Mrs. Loewenberg, to enforce certain alleged obligations which are said to have devolved upon the defendants by reason of their having gone into possession of the estates of their parents.

The acts and circumstances from which the litigation has arisen may be stated, from the record, as follows:

Marcus A. Marks, the father of Mrs. Loewenberg, lived in New York, and, dying there in 1894, left a will whereby he put part of his estate in trust to be so held until his youngest child should attain majority, and named his wife (plaintiff herein), Aaron M. Marks, and Samuel Loewenberg as his executors and trustees. The affairs of the estate appear to have been settled and the trust fund to have passed into the hands of the trustees in January, 1896, and thereafter in anticipation of the distribution of that fund, Mr. and Mrs. Loewenberg, who were temporarily in New York, executed a written instrument reading, in part, as follows:

"Agreement made this thirteenth day of October, 1905, between Rosa Loewenberg and Samuel Loewenberg, her husband, of the city of New Orleans, state of Louisiana, parties of the first part, and Samuel Loewenberg in his capacity as trustee hereunder, party of the second part."

Then follows a preamble, reciting that Rosa Loewenberg is the daughter of Marcus A. Marks, deceased; that Marks died leaving a will which had been admitted to probate, and whereby the persons mentioned had been named as executors and trustees and had qualified as executors; that their accounts in that capacity had been allowed, passed, and judicially settled; that they had been dis-

charged as executors, had been directed to hold the balance of the estate as trustees, and had so done; that the youngest child was to attain majority in December, 1905; and that:

"The said parties of the first part hereto are desirous of creating a trust fund, to be composed of the interest of the said Rosa Loewenberg in the estate of the said Marcus A. Marks, of whatsoever nature said interest may be, for the benefit of the said Sally Marks, during her life.

"Now, therefore, this agreement witnesseth that, in consideration of the premises and of one dollar by each party hereto to the other in hand paid, and of the love and affection which the said parties of the first part have for the said Sally Marks, and in consideration of the agreement of the second party to act as trustee thereunder; it is agreed as follows:

"First. That the said Rosa Loewenberg, her said husband joining with her for greater assurance of title to the trustee hereinafter named, hereby grants \* \* \* and conveys unto the said party of the second part and unto his successors all of her right, title and interest in and to any part or portion of the said estate of the said Marcus A. Marks, howsoever the same may be derived, and in and to the fund now held in trust by the said Sally Marks, Aaron A. Marks and Samuel Loewenberg under the last will and testament of the said Marcus A. Marks, in trust, nevertheless, to hold, receive, invest, reinvest and collect the rents, issues and profits thereof, and, after deducting all expenses of administration of the said trust, including compensation of the said trustee, as hereinafter stated, to pay quarterly the net income received therefrom to the said Sally Marks during the term of her life, or so long as she remains the widow of the said Marcus A. Marks, and, upon her death, to pay over and distribute the principal of said fund and any income which has then accrued but has not been disbursed, to the said Rosa Loewenberg, or to her heirs, executors, administrators or assigns."

And then follow further stipulations authorizing the trustee to dispose of any and all property coming into his hands and reinvest the proceeds as he may deem advisable, binding the parties of the first part (meaning himself and his wife) to convey to him, at his request, "any property which shall compose a part of the estate of the said Marcus A. Marks, or which shall be held pursuant to the trust created by his will at the time that his youngest son becomes twenty-one years of age and during

the lifetime of the said Sally Marks," authorizing the executors and trustees of said Marks to transfer to him any property that may be held by them; and "each for herself and himself," granting, selling, conveying, etc., all of their and each of their right, title and interest in and to certain described real estate in Kings county, N. Y. The share of Mrs. Loewenberg in the fund to be distributed amounted, as thereafter ascertained, to \$8,787.36, from which her husband, as trustee, appears to have derived a net annual income of \$516, which he paid to Mrs. Sally Marks, in semiannual installments of \$258, until his death, on December 12, 1907; after which it was paid by Mrs. Loewenberg (who, with the heirs of the decedent, was put in possession of his estate, she, as widow in community, legatee of the disposable portion and usufructuary, and they, subject to her usufruct) until her death, in (probably) the early part of 1915. Shortly after that event, her children and heirs caused to be admitted to probate the last will of the decedent, which, with certain dispositions in favor of the proponents, contains the following:

"I direct that thirteen thousand five hundred dollars be invested, out of the funds constituting my estate, in bonds of the city of New Orleans, or other bonds of equal merit, which shall be registered in the name of my three children, but the revenue thereof shall go to my step mother, Mrs. Sallie Marcus Marks, during the term of her natural life, as an annuity."

And, the will having been ordered to be executed, there was judgment sending the heirs into possession of the estate in accordance with its terms, which was followed, a few days later, by the institution of this suit, in which plaintiff, admitting, in effect, that defendants are ready to pay the annuity contemplated by the will of their mother, complains that they refuse to continue that provided for by the deed of trust, alleging that Mrs. Loewenberg incurred that obligation by going into possession of the estate of her husband, including the trust fund of \$8,-

687.36, and that defendants became similarly bound by going into possession of her estate. The prayer of the petition is for a judgment: (1) For \$258, with interest from July 1, 1915; (2) recognizing her right to a like amount upon the 1st days of January and July of every year during her life; (3) ordering defendants, within a term to be fixed, to give security for the payment of her claim against them as follows:

"Value of annuity on bequest of \$13,500.00 is \$3,493.07. Value of annuity on trust fund of \$8,687.36 is \$4,644.00—being a total of \$8,137.07, plus 25 per cent. is \$10,171.34; and, failing to do so, within the period to be fixed by the court, that the ex parte judgment rendered herein on July 23, 1915, putting the heirs in possession, be set aside and an administrator of the said succession be appointed to administer the affairs of the estate, according to law."

Upon the filing of the petition, an order nisi was made requiring the defendants to show cause on a day fixed why they should not give security in the sum of \$10,171.34, as prayed for; and thereupon they filed an exception of estoppel, another to the proceeding by rule, another of no cause of action, and still another to the jurisdiction of the court, which having been overruled, they were ordered to give the security as prayed for, within seven days, or, failing to do so, plaintiff was authorized to take such proceedings as the law allows. From that judgment defendants were allowed a suspensive appeal, and brought up the appeal in the transcript No. 21,637, though the order of appeal appears to have been subsequently restricted to so much of the judgment as required the giving of the security, and, in the meanwhile, at the suggestion of plaintiff's counsel, the amount of security required appears to have been reduced to \$5,805.00. Defendants then filed their answer, in which they admit that payments were made to plaintiff, as alleged in the petition, but deny that they were made in connection with any trust estate or legal obligation on the part of their mother; and allege that she and they were

informed and believed that all obligations which formerly rested upon their mother, under any agreement with plaintiff, were discharged at the time of the settlement of the estate of Marcus Marks. They deny that their mother "accepted" the alleged trust, that she intended to administer the same, or that it was supported by any consideration; and aver that, as they believe that the payments made by her were intended as gratuities, and they have undertaken to carry into effect the provision of her will upon that subject, that, not only was the so-called trust agreement abrogated, as shown in the succession proceedings of Marcus Marks, and especially by the discharge of the executor, but, should the court find otherwise, then, in the alternative, that it was not enforceable under the law of this state.

"Respondents further aver that their mother, \* \* \* not only continued to make the semi-annual payments of \$258, in order to provide for plaintiff herein (her stepmother) during her life, but, at the time of the making of her said last will, the said Mrs. Loewenberg incorporated therein the provision above referred to, \* \* \* so as to continue to provide for the said Mrs. Marks, after the death of the said Mrs. Loewenberg; that the said provision was intended by the said Mrs. Loewenberg to be in lieu of, and to supplant, the payments which Mrs. Loewenberg had been in the habit of making up to the time of her death, and it was her will and intention that her heirs, \* \* \* defendants herein, should continue to make payments to plaintiff herein semiannually; that the said executrix, carrying out that intention, figured that the income derived from an investment in bonds to the extent of \$13,500 would equal, as closely as could be calculated, the said semiannual payment of \$258; that the attempt of plaintiff to recover not only the amount mentioned in the said will, but also the \$258 semiannually is in bad faith."

They further, and in the alternative (should it be held that plaintiff is entitled to judgment for said payments), allege and plead that the bequest in favor of plaintiff, as contained in the will of their mother, constitutes a *fidel commissum* under the law of this state, is void, and should be regarded as not written; that it is their desire to con-

tinue to carry out the wishes of their mother, as expressed in her will; but that, if the claim here asserted by plaintiff be sustained, they would be called on to pay her, approximately, twice the amount that their mother intended that she should receive.

They aver that, under no circumstances, can plaintiff recover a specific amount, even though the alleged trust agreement be sustained; her remedy in such case being an action for an accounting with respect to the revenue derived from the investment of \$8,687.36.

On the trial in the district court, defendants offered to prove, by the notary who drew Mrs. Loewenberg's will, certain statements made by her, on some previous occasion, and the court having ruled that the objections thereto, urged by plaintiffs, should go to the effect the testimony was admitted, and, so far as it need be here considered, reads as follows:

"Mrs. Loewenberg stated to me that she had been in the habit of remitting an allowance twice a year to her stepmother of certain sums of money, and she desired that after her death this allowance should be perpetuated, as long as her stepmother lived; and I was asked in what manner it best could be done in such a way as to insure the payment of that semiannual allowance. It was then that I advised her \* \* \* that the surest way would be to provide in her will for the purchase of a sufficient number of bonds, advising constitutional bonds, \* \* \* the revenue from which would equal the amount of that semiannual allowance, the bonds to be registered, so as to prevent their salability, with the instructions that the income from those bonds should be forwarded, semiannually, to her stepmother. I figured out the amount—the principal of the bonds—that would yield an amount equal to the sum she remitted to her stepmother, semiannually. That satisfied her, and, by appointment, she subsequently came to the office and dictated to me the clause in the will which corresponded to the advice I had given her. \* \* \*

"(Cross-Ex.) Q. You have testified that you were thoroughly familiar with the intentions of the testatrix? A. Yes, sir. Q. And, those intentions you expressed to the best of your ability? A. Yes, sir. \* \* \* I didn't know Mrs. Loewenberg had obligated herself to do anything with reference to the payment to Mrs. Marks, her stepmother, or the existence of any deed of trust, or anything that would bind her

to the payment, semiannual payment, to her mother. I knew she made the payment annually."

Included with other documents offered by plaintiff, on the day of the argument, was an instrument bearing even date with the deed of trust, acknowledged by plaintiff before the same notary and recorded at the same time, in which plaintiff makes the following declaration, to wit:

"In consideration of the love and affection for all persons hereinafter named, and also in consideration of the execution and delivery by Aaron M. Marks and Sarah H. Marks, his wife, Lillie Baumgart and Isidore Baumgart, her husband, Mollie Herrman and Julius Herrman, her husband, Morris Marks, Agnes Liberman and Bernard Liberman, and David Marks, of a certain agreement or trust deed, bearing even date herewith, and of the execution and delivery of Rosa Loewenberg and Samuel Loewenberg, her husband, of a certain other agreement or trust deed, of even date herewith, under the provisions of which agreements or trust deeds, respectively, trust funds are established, the income from which is to be paid to me during the term of my life, I have granted, \* \* \* conveyed \* \* \* and do, by these presents, grant \* \* \* convey \* \* \*" (to the parties above mentioned, naming them) "all my interest \* \* \* in and to any part, or portion of the estate of the said Marcus A. Marks, deceased, including all dower right or thirds or other similar right or estate."

And there are further declarations, the purpose of which is to make more specific the grant or conveyance thus expressed.

#### Opinion.

Plaintiff was the sole party to the instrument last above quoted, and there is no pleading or evidence in the record which connects any one else with it. It is not alluded to in her petition, or in the deed of trust which is made part of the petition and which contains the recital that the accounts of the executors of Marcus Marks were "allowed, passed and judicially settled" by a decree of the Surrogate's Court of Kings county, N. Y., of date February 17, 1896; that Loewenberg and his wife "are desirous of creating a trust fund, to be composed of



her interest in her father's estate" for the benefit of Mrs. Sallie Marks; and that, in consideration of the premises and of one dollar, paid by each to the other, and of their love and affection for Mrs. Marks, they do create such a fund, etc.

[2] If objected to, the instrument must necessarily have been excluded, and, having been admitted without objection, it can be given no effect, for the reason that it is an *ex parte* affair of which neither defendants nor their parents are shown to have had any previous knowledge. Dismissing it from further consideration, we find several insuperable obstacles to the recovery here sought by plaintiff, to wit:

1. She bases her claim upon a contract between husband and wife who were domiciled in Louisiana and whose relations towards each other, not only when at home but when temporarily in another jurisdiction, were governed by the law of their domicile, which law (save in so far as it may have been modified by Act 94 of 1916, p. 212) prohibits all contracts between husband and wife, unless expressly excepted, and the contract in question is not included in any exception to which our attention has been called. C. C. arts. 1790, 2446; *Le Breton v. Nouchet*, 3 Mart. (O. S.) 70; *Augusta Ins. Co. v. Morton*, 3 La. Ann. 417; *Robert v. Wilkinson*, 5 La. Ann. 372; *Compton v. Sanford*, 28 La. Ann. 237; *Burns v. Thompson*, 39 La. Ann. 378, 1 South. 913.

[3] 2. Apart from the incapacity of the parties, the contract, having for its purpose the creation of a trust estate, is prohibited and unenforceable in this state. C. C. art. 1520; *Heirs of Henderson v. Rost*, 5 La. Ann. 461; *Succession of Franklin*, 7 La. Ann. 395:

"Fidei commissa, the trusts of the English law," said this court in *Partee, Trustee, v. Succession of Hill*, 12 La. Ann. 767, "cannot be created in Louisiana and enforced in our courts." *Perin v. McMicken's Heirs*, 15 La. Ann. 154.

See, also, *Succession of Beauregard*, 49 La. Ann. 1176, 22 South. 348; *Succession of Ward*, 110 La. 75, 34 South. 135; *Succession of Herber*, 128 La. 115, 54 South. 579; *Succession of Pleasants*, 130 La. 277, 57 South. 923.

[4] 3. The testimony of the notary, as to the statements made to him by Mrs. Loewenberg, and the advice given by him, was admissible, we think, for the purpose for which it was offered; that is to say, not to defeat the bequest, or to affect the interpretation of the language in which it is framed, but to aid in the determination of the question whether, in view of the annuity thus provided for, it was the intention of the testatrix that the annuity which she had been allowing, during her life, should thereby be continued, after her death, or doubled. Considering that testimony, in connection with all the circumstances disclosed, and with the fact that no reason is suggested why the amount originally determined upon should have been increased, our conclusion is that the bequest was intended merely to secure the payment of the annuity which plaintiff had been receiving, and, no doubt, expected to receive during her life.

As defendants have expressed the desire to carry into effect the wishes of their mother, as stated in her will, and as their attack upon the legality of her bequest in favor of the plaintiff is made only as an alternative, should the court sustain the deed of trust, we find it unnecessary at this time, to enter upon the consideration of the merits of that attack. We find in the record a motion and order "that the record No. 21,637 \* \* \*" (being the record of the appeal from the judgment on the exceptions and the rule requiring security) "be used in and consolidated with the record herein, under the No. 22,186"; but, as the briefs of counsel bear only the number last mentioned and contain no reference to the matters brought up by the first appeal, we premit their present con-

sideration, without prejudice to the right of the litigants, or either of them, to have them hereafter determined.

For the reasons thus assigned, it is ordered and decreed that the judgment rendered June 19, 1916, and signed June 30, 1916, herein appealed from, be annulled, and that there now be judgment for defendants, rejecting the demands of the plaintiff at her cost in both courts.

(78 South. 469)

No. 22736.

ARTHUR v. ALEXANDRIA LUMBER CO.,  
Limited.

(April 1, 1918.)

(*Syllabus by Editorial Staff.*)

1. MASTER AND SERVANT  $\S$ 256(3)—EMPLOYERS' LIABILITY ACT—PETITION.

A widow's petition, for damages for death of her husband in service, which did not allege that the death was by accident arising out of and in the course of the employment, showed no cause of action under the Employers' Liability Act (Act No. 20 of 1914).

2. MASTER AND SERVANT  $\S$ 256(1)—DEATH OF SERVANT—PLEADING.

In a widow's suit for her husband's death in service when killed by an electric current, natural or generated, when he went into a frame building on the premises of defendant or was forced to take refuge therein from a rain, the petition, which did not explain why defendant was responsible for the husband's being in the building at the time, though stating that the husband was in defendant's employ, and that he had a right to be in the building, did not state a cause of action.

3. PLEADING  $\S$ 34(4) — CONSTRUCTION AGAINST PLEADER.

Pleadings are construed strictly against the pleader.

4. PLEADING  $\S$ 8(18)—CONCLUSION OF LAW.

In widow's suit for husband's death in service, the allegation of the petition that the husband had the right to be in the building where he was killed was a mere conclusion of law, which cannot be made to serve for the allegation of a fact necessary to be alleged.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; James Andrews, Judge.

Suit by Frances Arthur against the Alex-

andria Lumber Company, Limited. From a judgment for defendant, plaintiff appeals. Affirmed.

Paul A. Sompayrac, of New Orleans, and R. H. McGimsey, of Alexandria, for appellant. Blackman, Overton & Dawkins, of Alexandria, for appellee.

PROVOSTY, J. [1] Plaintiff sues in damages for the death of her husband, which, she alleges, occurred while he was in the employ of the defendant company. She does not allege that it was "by accident arising out of and in the course of such employment"; and because of the absence of this allegation the defendant contends, very properly, that her petition shows no cause of action under the Employers' Liability Act. But defendant at the same time contends that the cause of action, if any plaintiff have, is under said act. By this we understand defendant to contend that plaintiff's petition shows a cause of action neither under said act nor under article 2315 of the Code.

The petition alleges:

That plaintiff's husband was a tram repairer at the sawmill of the defendant company, and that his death was caused by the negligence of the defendant company, as follows: That "he went into a frame building on the premises of the defendant, at its plant, or he was forced to take refuge therein from a rain. \* \* \* That defendant had located near said frame building, an electric light pole, over which it had strung wires that attracted and transmitted electric currents, and had placed there, or on said pole, an electric switch that also attracted the electric currents.

"That while deceased was in said frame building, where he had a right to be, an electric current, generated by a power plant, or from a flash of lightning on or attracted to them by the aforesaid wires and switch leaked from said defective wires, switch or pole and darted into or was transmitted into the building, and struck petitioner's husband and killed him.

"That neither the electric wires, electric switch, nor pole was properly insulated, and they all leaked, and were unfit and not adequate for the dangerous purpose and use to which they were put, and particularly because of their location on the premises where petitioner and other persons were called and constantly passing."

That the defendant well knew of these conditions and of their danger to all persons called there or passing by.

[2, 3] The plaintiff's husband's having received the injury by reason of his having been in this building at the moment of the flash of lightning, the cause of action of plaintiff depends altogether upon whether the defendant was responsible for his having been there at that moment. If defendant was so responsible, the petition certainly does not explain why. It simply says that the deceased went into the building, or was forced to take refuge there from a rain. Pleadings are construed strictly against the pleader, for the reason that the pleader must be assumed to have stated his case as strongly as he could. We have to assume, therefore, that plaintiff has no reason to give why the defendant should be responsible for her husband's having been in this building at that moment.

Very true the petition says that the deceased was in the employ of defendant, but this is not equivalent to saying that his employment necessitated his presence in this building. Indeed, the allegation that he simply went in there, or took refuge there from a rain, would tend to exclude the idea of his having gone there by reason of his employment.

[4] True, also, there is the allegation that he had the right to be there. But this is a mere conclusion of law. The facts from which such right resulted, if at all, are not stated. The allegation of a conclusion of law cannot be made to serve for the allegation of a fact necessary to be alleged.

Judgment affirmed.

(78 South. 470)

No. 21352.

CONGDON v. LOUISIANA SAWMILL CO.,  
Limited.

(April 1, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §92(1)—MASTER'S EMPLOYMENT OF PHYSICIAN—NEGLIGENCE OF PHYSICIAN—LIABILITY OF MASTER.

Where an employer employs a physician or surgeon of ordinary skill and ability to attend

to his employes, and pays the physician from a fund collected from the employes, and from which fund the employer derives no profit, he is not responsible in damages to an employe for mistakes of or malpractice by such physician; particularly, where it is not charged and proved that the employer was negligent in the selection of the physician.

2. MASTER AND SERVANT §92(1)—LIABILITY OF MASTER—NEGLIGENCE OF PHYSICIAN—PETITION.

A petition for damages in such case should contain allegations of neglect on the part of the employer in employing a competent physician, and that he derived some profit from the fund contributed by the employes to pay the physician. In the absence of such allegations, the petition discloses no cause of action.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by George W. Congdon against the Louisiana Sawmill Company, Limited. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Mims & Peterman and R. C. Culpepper, all of Alexandria, for appellant. Blackman, Overton & Dawkins, of Alexandria, for appellee.

SOMMERVILLE, J. Plaintiff sues to recover \$5,000 damages against defendant, and, for cause of action, shows that, while he was in the employ of the defendant, a lumber company, he sought the medical aid of Dr. Broadway, "the sawmill physician of said company," to remove a wart that was on his back, and which had been, for some time, a source of annoyance to him; that, in endeavoring to remove the wart, said physician applied an acid carelessly, recklessly, and negligently; that he poured the acid on plaintiff's naked back, and it circled around his body, consuming skin and flesh in its course; that said physician, through negligence or lack of proper knowledge and skill, utterly failed to relieve petitioner.

Plaintiff further alleged:

"That, in this case, as was and had been customary with all the employes of said company, the said company retained out of petitioner's

wages a certain sum of money for the specific purpose of insuring medical aid and treatment for petitioner whenever it became necessary and expedient for him to have same; that, while the employes of the company contributed out of their wages and salaries earned by them, as employes of the company, or rather the same was withheld by the company for the purpose of establishing a fund to be used solely and exclusively by the company with which to employ a physician to look after the health of its employes and treat such of them as may apply to such physician for treatment, your petitioner had nothing whatever to do with the employment of such physician or of fixing his salary, but said fund was and is under the sole and exclusive management and control of defendant company, and the physician so employed by it is alone responsible to said company. He shows further that the said Dr. C. B. Broadway was regularly employed by and had his salary paid him by said defendant company, and had his office adjacent to the company's mill, and was at the time of said alleged injuries actually engaged in the discharge of his duties at his said office and acting within the scope of his employment as an employe of said company. Petitioner alleges that on the occasion above mentioned he called upon said physician at his office for the sole purpose of obtaining treatment from said sawmill physician, as he had a right to expect and to have from him as an employe of defendant company in consideration of petitioner's payment to the company or the company's retention of the medical dues from his wages as aforesaid."

To this petition the defendant filed an exception of no cause of action, which was overruled. The defendant answered, reserving the benefit of the exception.

The case went to trial on the merits, and it was decided in favor of defendant. Plaintiff has appealed.

The exception of no cause of action should have been sustained.

[1] Plaintiff does not allege that the defendant derived any profit from the employment of the physician employed by it, or out of the fund created for the purpose of paying the physician's salary. He does not allege that the defendant failed to exercise ordinary care in its selection of a physician to treat injured and sick employes. He does not even allege that Dr. Broadway, the physician selected by defendant, was an incompetent physician. These were necessary al-

legations to show cause of action by him against defendant.

Plaintiff seeks to hold defendant responsible solely and exclusively upon the theory that, where an employer raises, out of the wages of the employes, a fund, for the purpose of rendering medical aid and treatment to his employes and their families, and, acting as agent or trustee of this fund, employs a physician, the employer is responsible for any negligent act of surgical or medical attention by the physician to one of the employes, resulting in injury to the employe, even though the employer derives no profit out of his relation as agent of such fund, and even though the physician selected and retained by the employer is a competent physician.

The law applicable is well settled, by an almost unbroken line of decisions of this and other courts, to be the opposite of plaintiff's contention.

Under the decisions, the employer can be made to respond in damages in such a case only in the event that he fails to exercise ordinary care in the selection of the physician, or in the event that he derives a pecuniary profit out of the fund employed for hospital or medical purposes.

The only case decided by this court relating to the question here presented is *Nations v. Luddington, etc., Co.*, 133 La. 657, 63 South. 257, 48 L. R. A. (N. S.) 531, Ann. Cas. 1916B, 471, wherein an employe was killed by the administration of chloroform by a layman with the knowledge and permission of the defendant, and where an immediate operation was unnecessary, and an assistant physician could readily have been procured to administer the chloroform; and there the court said:

"A condition of the employment contract at the defendant's mill was that the company should withhold weekly out of the wages of the employes a certain amount to go towards a fund for securing medical aid for the employes in case of need. The company itself contributed

no part towards the fund, but derived no profit therefrom, save perhaps in the betterment brought about thereby in its labor conditions. Beyond making this weekly contribution, the employes took no part in the procuring of the medical aid. The company retained that function in its own hands.

"This was a business arrangement between the parties; and a part of the company's understanding was to use due care in providing the employes with a competent physician, or with two if needed. The Supreme Court of Missouri, in the case of *Phillips v. St. Louis*, etc., R. Co., 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 780, 14 Ann. Cas. 742, has held that the company in such a case must go beyond employing a competent physician; that it 'must go further and competently treat the patient.' But the weight of authority seems to be that:

"Where an employer derives no profit from the retention of the hospital fund from its employes, it is liable only for failure to exercise ordinary care to select, employ, and retain a competent physician."

We might refer to a long line of decisions holding that:

"Where a master employs a surgeon for the benefit of its men and without profit to itself, it is not liable for the surgeon's malpractice in case it exercised reasonable care in the selection of a competent surgeon." *Simon v. Hamilton Logging Co.*, 76 Wash. 370, 136 Pac. 361; *Eastman, Gardiner & Co. v. Permenter*, 111 Miss. 813, 72 South. 234; *Engirbritson v. Tri-State Cedar Co.*, 91 Wash. 279, 157 Pac. 677; *St. Louis, I. M. & S. R. Co. v. Taylor*, 113 Ark. 445, 168 S. W. 564; *Tippecanoe Loan & Trust Co. v. Cleveland, C. C. & St. L. Ry. Co.*, 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739; *Guy v. Lanark Fuel Co.*, 72 W. Va. 728, 79 S. E. 941, 48 L. R. A. (N. S.) 536; *Atlantic Coast Line R. Co. v. Whitney*, 62 Fla. 124, 56 South. 937; *Arkansas Midland R. Co. v. Pearson*, 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 317; *Wells v. Ferry-Baker Lumber Co.*, 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; (1900) *Cummings v. Chicago & N. W. Ry. Co.*, 89 Ill. App. 199, writ of error dismissed (1901) 189 Ill. 608, 60 N. E. 51; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. Rep. 313; *Maine v. Chicago, B. & Q. R. Co.*, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Louisville & N. R. Co. v. Foard*, 104 Ky. 456, 47 S. W. 342, 20 Ky. Law Rep. 646; *Haggerty v. St. Louis, K. & N. W. R. Co.*, 100 Mo. App. 424, 74 S. W. 456; *Poling v. San Antonio & A. P. Ry.*, 75 S. W. 69, 32 Tex. Civ. App. 487; *Big Stone Gap Iron Co. v. Ketron*, 45 S. E. 740, 102 Va. 23, 102 Am. St. Rep. 839.

[2] Plaintiff, not having alleged that defendant was negligent in the selection of the

physician cannot prove the neglect or malpractice by the physician, under the doctrine of respondeat superior, which he appears to invoke. Defendant was only bound to exercise reasonable care in selecting a surgeon of average skill.

In the case of *Quinn v. Railroad*, 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. Rep. 767, it is said:

"Plaintiff in error insists that the defendant in error is liable for the mistakes or malpractice of the surgeons in question; that their employment by the railroad created the relation of master and servant; and that the ordinary rule, which makes the master liable for the negligent acts of his servant within the scope of his employment, is to be applied in this case. If he be correct in his contention that the relation between the railroad and these surgeons was that of master and servant, then his conclusion would properly follow. But was that the relationship? We do not think so. The term 'servant,' as it is used in connection with the rule invoked, has a well-defined meaning. It 'is applicable,' says Mr. Thompson, in his work on Negligence (volume 2, p. 892), 'to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists.'"

"For the relation to exist, so as to make the master responsible, he must not only have the power to select the servant, but to direct the mode of executing, and to so control him in his acts in the course of his employment as to prevent injury to others." *Robinson v. Webb*, 11 Bush [Ky.] 464. To the same effect is *Mound City, etc., Co. v. Conlon*, 92 Mo. 221 [4 S. W. 922]; *Wiltse v. State, etc., Co.*, 63 Mich. 639 [30 N. W. 370]; *Anderson v. Bordecker*, 17 Ill. App. 213.

"The term 'master' is equally well defined in the law. A 'master,' in the sense of the rule, is 'one who has the superior choice, control, and direction; whose will is represented not merely in the ultimate result in hand, but in all its details; one who is the responsible head of a given industry; one who has the power to discharge; one who not only prescribes the duty, but directs, and may at any time direct, the means and methods of doing the work.' 14 Am. & Eng. Encyc. of Law, 745.

"If it be, as these authorities indicate (and it cannot be otherwise), that the decisive test of this relationship, or even one of its decisive tests, is that the master has the right to select the end of the servant's employment, and that the master's uncontrolled will is the law of the servant 'in the means and methods' by which this end is to be reached, then it cannot be

maintained that these surgeons were the 'servants' of this corporation. They were not employed to do ordinary corporate work, but to render services requiring special training, skill, and experience. To perform these services so as to make them effectual for the saving of life or limb, it was necessary that these surgeons should bring to their work not only their best skill, but the right to exercise it in accordance with their soundest judgment, and without interference. Not only was this the right of these surgeons, but it was as well a duty that the law imposed. If the railroad authorities had undertaken to direct them as to the method of treatment of the injured man, and this method was regarded by them as unwise, they would have been 'bound to exercise their own skill and better judgment, and to disobey their employers, if in their opinion the welfare of the patient required it.' *Union Pac. Ry. Co. v. Artist* (8 U. S. Cir. Ct.) 60 Fed. Rep. 365 [9 C. C. A. 14, 23 L. R. A. 581].

"In accordance with this view it has been uniformly held, so far as we have been able to discover, that, having selected surgeons skilled and competent in their profession, the corporation has discharged every duty that humanity or sound morals impose, and that it is to no extent liable for the mistakes they may subsequently commit."

To the same effect is the decision in *Pittsburgh, etc., R. Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. Rep. 313, and the authorities therein cited.

Plaintiff failed to state a cause of action in his petition, and the exception thereto should have been sustained.

The judgment dismissing plaintiff's suit at his costs is affirmed.

O'NIELL and LECHE, JJ., concur in the decree.

(78 South. 473)

No. 21262.

W. T. BAKER & CO., Limited, v. DAVIS.

(April 1, 1918.)

(*Syllabus by the Court.*)

HOMESTEAD §140 — RIGHT OF SURVIVING HUSBAND OR WIFE—DEPENDENTS.

In order to entitle a surviving spouse, under paragraph 4 of article 244 of the Constitution, to the benefit of a homestead exemption, such spouse must have a father or mother or a person or persons dependent upon him or her for support.

Appeal from Third Judicial District Court, Parish of Blenville; J. E. Reynolds, Special Judge.

Action by W. T. Baker & Co., Limited, against Dave Davis. From a judgment refusing to recognize his homestead exemption, defendant appeals. Affirmed.

W. U. Richardson, of Arcadia, and Wimberly, Reeves & Dornon, of Shreveport, for appellant. Goff & Barnette, of Arcadia, for appellee.

LECHE, J. Defendant appeals from a judgment refusing to recognize him as entitled to a homestead exemption under article 244 of the Constitution. He owns and occupies a small farm, worth between \$500 and \$800. His wife died several years ago. His children are all grown and living away from him, and he has no one dependent upon him for support, but he claims that, as surviving spouse, he is entitled to the exemption under paragraph 4 of article 244 of the Constitution, which reads as follows:

"The benefit of this exemption may be claimed by the surviving spouse, or minor child or children, of a deceased beneficiary."

In order to recognize defendant's claim, it would be necessary to interpret this clause of the Constitution as meaning that every widow and widower, by the mere fact of once having been married, would forever be entitled to the homestead exemption though no one were dependent upon her or upon him for support. We do not think that the quoted clause, when construed in connection with the first paragraph of article 244, conveys any such meaning; on the contrary, we believe that the surviving spouse must be one having a mother or father or a person or persons dependent upon him or her for support, and that its main purpose is to entitle the surviving spouse, having dependents upon him or upon her, to claim the benefit of homestead on property belonging to the com-

munity and owned by the survivor in indivision with the heirs of the deceased. We held in the case of *Tinney v. Vittur*, 134 La. 551, 552, 64 South. 407, that a surviving wife, as head of a family, having seven minors dependent upon her for support, was entitled to the exemption. In the case of *Milliken & Farwell v. Roger et al.*, 138 La. 826, 70 South. 848, a surviving husband, having a daughter dependent upon him, was held entitled to the exemption. The right to a homestead exemption was also recognized in favor of a surviving husband in the case of *Adams v. McCoy*, 140 La. 30, 72 South. 797. In all three of these cases, the property belonged to the community, was held by the survivor in indivision, and could not, as property owned in indivision, under the jurisprudence previous to the Constitution of 1879, where the said paragraph was first adopted, have been held subject to exemption.

On the other hand, in the case (No. 22666) of *Whyte v. Grant, Sheriff, et al.*, 77 South. 643,<sup>1</sup> lately decided, we held that a widow, not having any one dependent upon her for support, was not the head of a family, and not entitled to the homestead exemption.

The judgment appealed from is affirmed.

O'NIELL, J., concurs in the decree.

(78 South. 473)

No. 22485.

RUSSELL et al. v. PRODUCERS' OIL CO.  
et al.

(Feb. 25, 1918. On Application for Rehearing,  
April 11, 1918.)

(Syllabus by Editorial Staff.)

1. REAL ACTIONS ¶8(2)—PETITORY ACTION—  
BURDEN OF PROOF.

In a petitory action, the burden of proof is on plaintiff, and he can recover only on the strength of his own title, and not on the weakness of his adversary's.

<sup>1</sup> 143 La. 822.

2. BOUNDARIES ¶33—ACTION—BURDEN OF  
PROOF.

In an action in boundary, the law requires proof from each of the contiguous owners, and the burden is divided.

3. BOUNDARIES ¶39—ACTION IN BOUNDARY  
—INVESTIGATION BY EXPERTS.

In a boundary suit, the court, when not satisfied either from the lack of evidence or the weakness of its probative force, may cause of its own motion an investigation by experts to ascertain the facts necessary to reach an intelligent conclusion and render proper decree.

4. BOUNDARIES ¶39—BOUNDARY SUIT—IN-  
VESTIGATION BY EXPERTS.

In a petitory suit, changed by the manner of conducting trial into an action in boundary, the evidence being such that the judge cannot render a decision thereon, he may properly cause an investigation by experts to ascertain the facts.

5. BOUNDARIES ¶8—ACTION IN BOUNDARY  
—UNCERTAINTY—RIGHT TO DETERMINATION  
—STATUTE.

In boundary suit, though it seems impossible to determine with mathematical certainty the location of the disputed line, plaintiffs are entitled to have the limits of their property fixed under C. C. art. 823.

6. BOUNDARIES ¶37(3)—LOCATION—SUFFI-  
CIENCY OF EVIDENCE.

In a boundary suit involving ownership of an oil well, evidence held sufficient to justify decree for plaintiffs.

7. MINES AND MINERALS ¶73—OIL LEASE—  
INCLUSION OF WELL—PRESUMPTION.

Where, when an oil lease was executed from plaintiffs to a defendant oil company, the land on which a well had been drilled was claimed by another defendant company, which believed the well was inside its boundary line, though neither it nor plaintiffs knew the truth of the matter, in view of the circumstances, there is a reasonable presumption that the well was included in the lease.

Appeal from First Judicial District Court,  
Parish of Caddo; John R. Land, Judge.

Suit by Henry M. Russell and others  
against the Producers' Oil Company and an-  
other. From a judgment for defendants,  
plaintiffs appeal. Reversed, decree directed,  
and case remanded.

Clifton F. Davis, E. Wayles Browne, and  
Blanchard & Smith, all of Shreveport, for  
appellants. Hampden Story, of Shreveport,  
for appellee Producers' Oil Co. Herndon &

Herndon and Frank J. Looney, all of Shreveport, for appellee Atlanta & Shreveport Oil & Gas Co.

LECHE, J. The proceedings and the issues involved in this case are fully stated in an opinion delivered by the Chief Justice October 18, 1915, and reported in 138 La. at page 184, 70 South. 92.

After stating the salient facts which appeared in a massive transcript of testimony, written and printed documents, tracings, and maps, but without expressing any opinion on the merits of the claims advanced by the litigants, we therein stated:

"We abstain from a discussion of the main question in the case, not because of any failure to consider it, but because we are impressed with the conviction that the interests of justice will be best subserved by letting in the further light suggested by the motion to remand. The question to be determined is whether a well has been drilled upon the one side or the other of a line which should divide two quarter sections of land in a section and township which have been surveyed and subdivided by the authority of the government of the United States. One might think it a very simple question, but it is not so. No one on earth can furnish the information necessary for its decision, save the gentlemen of the civil engineering and surveying profession, and those of them who have testified in that behalf in this case have arrayed themselves upon opposing sides, etc. \* \* \* The suggestion contained in the motion to remand is that the United States government \* \* \* has thought proper, since the trial in the district court, to order a resurvey of the township in which the land here in dispute is situated, and, in order that the work should be thoroughly and scientifically done, required that the head of its surveying department should give it his personal attention."

The case was then remanded for the introduction of such additional and competent evidence as the litigants might see fit to offer touching the question of the proper location of the line dividing the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  from the S. E.  $\frac{1}{4}$  of section 3, township 20 N., range 16 W., in Caddo parish, and also for the purpose of permitting the litigants to introduce additional evidence upon the question whether, in the event judgment be rendered in favor of plaintiffs, the

defendant Producers' Oil Company should be held for the value of the whole amount of oil produced from the well in controversy or for royalty as agreed upon in the contract of lease set up by said company.

Pursuant to that decree the case was again tried in the district court for the parish of Caddo. The testimony of the surveyors employed in the survey by the United States government was taken and also that of several other surveyors, which, with a lot of maps, tracings, field notes, and typewritten and printed documents, has reached this court in the shape of an additional transcript.

The district judge, in a written opinion, at first came to the conclusion that he could not from the mass of evidence before him and which he characterized as "confusion worse confounded" reach an intelligent conclusion, and he thereupon ordered, ex officio and under his instructions as to the manner of proceeding, that a survey of the line in dispute be made by W. E. Martin and George R. Wilson, their report to be made within 30 days.

That report was duly made, locating the line 14.7 feet west of the center of the well, and thus placing the well on the land of defendant. In accordance with the said report, which, though opposed, was approved and homologated, judgment was rendered in favor of defendants.

The present appeal was taken by plaintiffs from that judgment.

Although the present case, as stated in our original opinion, bears all the earmarks of a petitory action, it has resolved itself by the admission of testimony, by the manner of conducting the trial, and by the action of the trial judge, approved and assented to by all the parties, into an action in boundary pure and simple. When the trial judge in his written opinion (Transcript, p. 46) announced, in substance, that the evi-



dence was too vague and indefinite to justify a finding on his part, and he, ex officio, ordered a survey by two surveyors of his own selection, he practically treated the case as an action in boundary. He proceeded precisely in the manner prescribed by the Civil Code (articles 841, 834, 837) to fix the limits between two contiguous estates. The action of the judge was approved by plaintiffs when they asked that he amend the instructions which he first gave to the commission of surveyors appointed by him, and it was approved and assented to by defendants when they moved (Transcript, p. 10) to homologate the report of the commission. It thus appears that the suit originally instituted as a petitory action has, by consent of all parties, been converted into an action in boundary. It is proper that this change in the real nature of the action should have been recognized and consented to, for, after all, there is no question of title involved herein. The parties, plaintiffs and defendants, admit each others' titles. Plaintiffs do not question that defendants own the S. E.  $\frac{1}{4}$  of section 3, nor do defendants assail the title of plaintiffs to the N. W.  $\frac{1}{4}$ , the N. E.  $\frac{1}{4}$ , and the S. W.  $\frac{1}{4}$ , of the S. W.  $\frac{1}{4}$  of the same section; the respective titles of the parties as to their lands are not at issue. What the parties do contest is the location of the dividing line between their properties, for upon the location of that line will depend the ownership of the oil well.

[1-4] It is important that the character of the present action be definitely ascertained and fixed in order to place the burden of proof where it properly belongs. In a petitory action, that burden is upon plaintiff who can recover only on the strength of his own title, and not upon the weakness of his adversary's. In an action in boundary, the law requires proof from each of the contiguous owners, and the burden is divided. In a petitory action, the court will either

nonsuit plaintiff or dismiss his demand if he fails to prove his ownership by a preponderance of evidence, while in a boundary suit the court may, when not satisfied either from the lack of evidence or the weakness of its probative force, cause, ex proprio motu an investigation by experts in order to ascertain the facts necessary to reach an intelligent conclusion and to render a proper decree. That is what the trial judge did in this case. His action was not excepted to, but was approved by the parties, and the proceeding was, in our opinion, logical and appropriate. It would have been of no advantage to any one, and it would have certainly prolonged this litigation, to have dismissed plaintiffs' suit and compelled them to bring another suit, an action in boundary, in order to accomplish the very same purpose.

We therefore dismiss from further consideration all question of burden of proof, and instead of viewing this case as one involving title to property, we will deal with it as one involving the location of a boundary between two contiguous estates, whose titles by their respective owners are not even remotely at issue.

Referring to the sketch which appears at page 186 of 138 La. (70 South. 92), a straight line joining the points on said sketch, marked "I" and "O," represents the boundary between the properties of plaintiffs and defendant; it is the dividing line between the W.  $\frac{1}{2}$  and the E.  $\frac{1}{2}$  of section 3, and therefore the proper location of that line must depend upon the proper location of the points "I" and "O". The point "I" was originally established in the official survey made by Mr. Williamson Jones, United States deputy surveyor, in 1837, and the point "O" was similarly established by Mr. A. W. Warren, United States deputy surveyor, in 1839, but all the visible signs and monuments by which these two points, designated in the

field as corners, were marked for identification, have, by the lapse of time, been obliterated. The problem, then, which was submitted to the engineers and surveyors who have been engaged in running the line I-O, involved the re-establishment of these two corners and relocating them exactly where they had been originally established by Jones and by Warren. In order to solve that problem, these gentlemen were compelled to have recourse to the only rational method recognized in their profession, that is, to start a survey from some other known corners, to reproduce and prolong lines according to the courses and distances indicated in the field notes accompanying the original surveys made by these two surveyors, until the two corners to be re-established are reached and located, then to prove up the result thus obtained by closing the whole survey and comparing the areas thus found with the areas given in the original surveys.

Several surveys, in accordance with the method thus indicated, were made in order to re-establish the lines and corners originally established by Jones and Warren.

[5] Mr. W. E. Martin, appointed by the court in behalf of plaintiffs, made a survey in which he located the line "I-O," 22.2 feet east of the oil well. Mr. H. E. Barnes, similarly appointed on behalf of defendants, found the line to be 15.7 feet west of the well. A private survey by Mr. H. H. Jenkins, on behalf of defendants, located the line 35 feet west of the well. Mr. A. D. Kidder, acting on behalf of the United States government, who made a survey for purposes not connected with this litigation, located the line 1.74 feet east of the well. Mr. Welman Bradford, who was employed by defendants, found the line to be 31.02 feet west of the well. Messrs. Martin and Wilson, surveying under directions and instructions from the trial court, reported the line run under those instructions to be 14.7 feet

west of the well. Many other surveyors testified in the case, and the diversity of opinion among these gentlemen is almost bewildering to the lay mind. The line in question has, by calculations based upon the resurveys in evidence, been located by these witnesses in many different positions varying from 35 feet west of the well to 22.2 feet east of it. But there is one fact which appears to be undisputed in this case, and it is that not one of the resurveys will coincide in area with the original surveys of Jones and Warren, and this of itself creates some doubt as to their correctness. The gentlemen who have been employed or consulted in this matter are all reputable members of the civil engineering and surveying profession; their work seems to have been done with care, and their opinions expressed only after deliberate consideration, and it therefore seems to be impossible to determine and to prove with mathematical and absolute certainty precisely where the corners designated on the sketch as "I" and "O" were originally established. That situation may as likely be the result of error in the original field notes as in the resurveys made in connection with this litigation. But even under these conditions, plaintiffs are entitled to have the limits of their property fixed (C. C. art. 823), and we shall proceed to do so according to what we consider to be the preponderance of evidence in the case.

[6] Among the several surveys made, one stands out as most worthy of consideration by the court. It was not made on behalf of any of the parties in interest in this litigation, but it was ordered by the United States government, and it was executed under instructions from the General Land Office, whose stamp of approval has been placed upon it. The engineer under whose personal supervision the work was done was Mr. Arthur D. Kidder, supervisor in chief of surveys

of the General Land Office, Interior Department of the United States, assisted by Messrs. A. N. Kimmell and F. D. Spofford, competent and experienced surveyors. Mr. Kidder at the time he testified had been connected with the surveying department of the General Land Office for 16 years, and had occupied the high and responsible position of a supervisor in chief of surveys with eight assistant supervisors under him since July 1, 1910. He is the author of a treatise on the Improved Solar Transit and the compiler of the tables of azimuths of Polaris, used by the government in its surveys. In the performance of his work he used two improved solar transits recognized as scientific instruments of great precision, and, with the aid of the tables published in the Ephemeris of the Sun and Polaris, he was able, by taking a great many observations on the sun and the north star, checking one instrument with the other to obtain on the field itself an accurate north and south line, and to determine with absolute accuracy the variation of the needle. His survey was begun about October 20, 1913, and with constant and continued attention on his part was only completed in May, 1914. Neither he nor his assistants, though aware of a contest involving the ownership of an oil well, knew, at the time of making the survey, any of the litigants in the case, nor did they know on which side of the line in dispute the said litigants respectively claimed the oil well to be located. Under these circumstances the recognized ability and competency of Mr. Kidder, the total absence of any possible bias on his part, the great care he exercised in the performance of his work, the most modern and scientific methods adopted by him, and the further fact that the result of his work bears the approval of the General Land Office, are, in our opinion, sufficient to establish a preponderance of evidence in favor of plaintiffs, and to justify a decree based

upon his findings under the law applicable to the case.

The only other question to be determined is whether plaintiffs, as owners of the soil through which the well was drilled, are entitled to its full production, or merely to a royalty thereon.

[7] When the Producers' Oil Company brought in the well on October 10, 1910, they owned mineral leases of the land on each side of the line in dispute, one from the plaintiffs and the other from defendant; that from plaintiffs having been entered into on October 8, 1910. When that lease was executed, the land on which the well had been drilled was claimed by defendant the Atlanta & Shreveport Oil & Gas Company, who believed that it was inside its boundary line, but as a matter of fact neither it nor plaintiffs knew whether the well was east or west of the line. It may have been this condition of uncertainty, as to the exact location of the line, that induced the Producers' Oil Company to secure the lease from plaintiffs. The consideration paid to plaintiffs, \$250 per acre, besides stipulated royalties, is a fair indication that both parties, while in doubt, suspected that the well might be on the premises of plaintiffs. A few days after the discovery of oil, on October 14th, Mr. Henry Russell, one of the plaintiffs, acting for himself and the heirs of Russell, and who had signed the lease in that capacity, wrote the Producers' Oil Company, and his letter contains the following statement:

"We claim the said well to be on our land, and expect to be paid royalties on the same."

There is no charge that the lease was obtained by the Producers' Oil Company through fraud or misrepresentation, nor is there any demand to have it set aside and avoided, but we are asked to exclude the well from its operation.

While the well could not, in the absence of

positive knowledge on the part of the parties at the time the lease was entered into, either have been expressly included in the lease or excluded from it, the chances of plaintiffs being recognized as owners of the land on which it was located, just like the chances of obtaining oil from any other part of the leased premises, may reasonably be presumed to have been in the contemplation of the parties. Henry Russell's letter, written at a time unsuspecting, so indicates; such is the contention of the Producers' Oil Company, and our opinion is to the same effect. We therefore see no reason to hold that the well is not included in the lease from plaintiffs in favor of the Producers' Oil Company, and as not subject to its conditions and stipulations.

For these reasons, the judgment appealed from is avoided and reversed, and it is now ordered that the boundary line between the northeast quarter of the southwest quarter of section 3, township 20 N., range 16 W., owned by plaintiffs, and the northwest quarter of the southeast quarter of the same section, same township and range, owned by defendant the Atlanta & Shreveport Oil & Gas Company, as located and re-established by Mr. Arthur D. Kidder, supervisor in chief of surveys of the United States General Land Office, in his survey completed in May, 1914, as per plat on file in this record, marked Exhibit —, be recognized and approved as the true boundary line between the said lands of plaintiffs and defendant, the Atlanta & Shreveport Oil & Gas Company; it is further ordered that the oil well situated on the lands of plaintiffs, 1.74 feet from the said boundary line and known heretofore as Atlanta & Shreveport well No. 1, be recognized and decreed as included in the lease entered into on October 8, 1910, between plaintiffs and the Producers' Oil Company and subject to the conditions and stipulations of said lease; it is further ordered that this case be remanded to the district court for the parish

of Caddo for the purpose of determining the royalties that may be due by the said Producers' Oil Company to the plaintiffs herein and for a full accounting by the said Producers' Oil Company to the plaintiffs of the output of said well, and that the costs of fixing the boundary line between the properties of plaintiffs and defendant the Atlanta & Shreveport Oil & Gas Company be paid in equal portions by the said Atlanta & Shreveport Oil & Gas Company and the plaintiffs.

#### On Application for Rehearing.

PER CURIAM. Applications for rehearing were filed by each of the parties to the above suit. We believe, after further consideration, that we have properly disposed of all the issues upon which we could pass, and that a rehearing should be refused, but in order to state our decree more clearly and to expressly reserve to the litigants such rights as we could not, for want of proof, have therein definitively adjudicated, we have concluded to recast said decree as follows:

"For these reasons, the judgment appealed from is avoided and reversed, and it is now ordered that the boundary line between the northeast quarter of the southwest quarter of section 3, township 20 N., range 16 W., owned by plaintiffs, and the northwest quarter of the southeast quarter of the same section, owned by defendant, the Atlanta & Shreveport Oil & Gas Company, be recognized and decreed to be that part of the straight line that connects the quarter corner on the north of section 3, with the quarter corner on the south of said section, as such corners are fixed and monumented by A. D. Kidder's resurvey, completed in May, 1914, being the center line of section 3, and which line runs 1.74 feet east of the well heretofore known as Atlanta & Shreveport well No. 1.

"It is further ordered that the said well, heretofore known as Atlanta & Shreveport well No. 1, be recognized and decreed as included in the lease entered into on October 8, 1910, between plaintiffs and the Producers' Oil Company and subject to the conditions and stipulations of said lease.

"It is further ordered that this cause be remanded to the district court for the parish of Caddo for the purpose of determining the amount of royalties that may be due by the said Producers' Oil Company to the plaintiffs and for a full accounting by the said Producers' Oil

Company to the plaintiffs of the output of said well.

"It is further ordered that all rights which the said Producers' Oil Company may have against the Atlanta & Shreveport Oil & Gas Company, as warrantors, be reserved.

"It is further ordered that the cost of fixing the boundary line between the above-described properties of plaintiffs and defendant, the Atlanta & Shreveport Oil & Gas Company, be paid in equal portions by the said plaintiffs and the Atlanta & Shreveport Oil & Gas Company; costs of appeal to be paid by appellee the Atlanta & Shreveport Oil & Gas Company."

It is ordered that our decree as thus restated be made final, and that the applications for rehearing be denied.

(78 South, 477)

No. 22431.

TYLER v. LEWIS et al.

(Feb. 25, 1918. On Application for Rehearing, April 11, 1918.)

(Syllabus by the Court.)

**1. DESCENT AND DISTRIBUTION §27—WILLS §10—SUCCESSION—CAPACITY TO TAKE—PRESUMPTION—COURSE OF NATURE.**

A child born capable of living is, by a provision of Civil Code, art. 186, and according to the laws of nature, presumed to have been conceived at least 180 days before the birth, and is therefore born in time to receive, by inheritance or testamentary disposition, an estate of a person who died within 180 days before the birth of the child.

**2. WILLS §497(7)—CONSTRUCTION—DEVISEE—STATUTE.**

The following testament is construed to include a grandchild born several years after the date of the will and on the 172d day after the death of the testator, viz.: "I give and bequeath all the property I may own in Louisiana at the time of my death to my grandchildren, issue of the marriage of my only daughter, Mary, with Alfred E. Lewis."

**3. DESCENT AND DISTRIBUTION §71(1) — SUCCESSION—STATUS AS HEIR OR LEGATEE—ACTION AGAINST COHEIRS OR COLEGATEES.**

One who asserts title by inheritance or under a will that has been admitted to probate may prove his or her status as an heir or a legatee, as well in a direct action for recognition of title or for partition, against a coheir or co-legatee under an universal title, as in probate proceedings.

**4. WILLS §260—NULLITY OF TESTAMENT—PRESCRIPTION—APPLICATION.**

The prescription of 5 years, that may be pleaded against an action for the nullity of a testament, does not apply to a partition suit in which the plaintiff claims title under and by virtue of a testament and asks that it be interpreted in her favor.

**5. TENANCY IN COMMON §15(1) — POSSESSION BY USUFRUCTUARY—PRESCRIPTION.**

The possession of property by an usufructuary as such is for the benefit of all of the co-owners, and cannot serve as a basis for the plea of prescription of ten years urged by one or some of the co-owners against another of them.

**6. ADVERSE POSSESSION §78—WILLS §522 —DISPOSITION TO CLASS—PRESCRIPTION.**

A testamentary disposition in favor of a designated class of persons collectively is not, upon its face, a transfer of title to any particular or designated member or members of the class, and therefore cannot serve as a basis for the prescription of 10 years *acquirendi causa*, pleaded by one or some of the members against another member of the class designated.

**7. ADVERSE POSSESSION §74—TITLE—JUDGMENT—PRESCRIPTION.**

An *ex parte* order or judgment, sending heirs or legatees into possession of an estate, is not, and does not purport to be, a transfer of title, and therefore cannot serve as a basis for the prescription of 10 years *acquirendi causa*.

**8. LIMITATION OF ACTIONS §72(3) — PRESCRIPTION—INFANCY.**

The prescription of 30 years, referred to in articles 1305, 3499, and 3548 of the Civil Code, is suspended during the minority of a person against whom it might otherwise operate.

**9. APPEAL AND ERROR §890 — PLEA OF ESTOPPEL IN APPELLATE COURT—CONSIDERATION.**

A plea of estoppel filed originally in an appellate court, based upon allegations of fact antedating the trial of the case, cannot be allowed or considered unless the record contains evidence of the facts alleged.

On Application for Rehearing.

(Additional Syllabus by Editorial Staff.)

**10. PARTITION §83 — COLLATION — EFFECT OF REFUSAL TO CONSIDER PLEA OF ESTOPPEL.**

Where the Supreme Court did not consider the merits of issues raised or attempted to be presented by plea of estoppel filed therein, its refusal to consider the plea would not prevent defendant's request for a collation, by way of opposition to the homologation of the partition proceedings.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Suit by Mrs. Edith L. Tyler against Alfred E. Lewis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry P. Dart, Jr., of New Orleans, curator ad hoc, and Dart, Kernan & Dart, of New Orleans, for appellants. Gulon, Lambremont & Gulon, of Napoleonville, for appellee.

#### Statement of the Case.

O'NIELL, J. Jacob R. Wolff, residing in Philadelphia, Pa., made the following testamentary disposition of his property in Louisiana, on the 15th of July, 1875, viz.:

"I give and bequeath all the property I may own in Louisiana at the time of my death to my grandchildren, issue of the marriage of my only daughter, Mary, with Alfred E. Lewis.

"I give and bequeath the usufruct of all the property I may own in Louisiana at the time of my death to my said daughter, Mary, wife of Alfred E. Lewis, and dispense her from giving security."

The testator died in Philadelphia on the 1st of September, 1878, and his will was admitted to probate in New Orleans, where he owned real estate of great value. His surviving daughter and heir at law, Mrs. Mary E. Lewis, had, at the time of her father's death, six children, who are the defendants in this suit, namely, Lucretia Mary Lewis, Alfred E. Lewis, Mary Wolff Lewis, Ellis Lewis, Francis Lewis, and Gerald Lewis.

On the 7th of December, 1878, Mrs. Mary Wolff Lewis and her husband (who had been appointed administrator of the estate of Jacob R. Wolff) filed a petition in the Second district court for the parish of Orleans, in behalf of Mrs. Lewis and of five of her children, all except Gerald Lewis, alleging that she desired to carry out her father's will and to accept the usufruct bequeathed to her in lieu of her rights as forced heir. She formally renounced her rights as forced heir, accepted the will, and prayed to be sent into possession of the property as usufructuary, and that her children, the five named in her petition, be recognized as universal legatees.

An ex parte judgment was rendered accordingly.

Thereafter it was discovered that the name of one of the testator's grandchildren, Gerald Lewis, had been omitted from the petition and judgment, and, on the petition of his parents, a supplemental order or judgment was rendered, ex parte, on the 30th of December, 1878, correcting the error by recognizing Gerald Lewis to be one of the six legatees.

The plaintiff was born of Mrs. Mary Wolff Lewis, issue of her marriage with Alfred E. Lewis, on the 20th of February, 1879, that is, within six months after the death of Jacob R. Wolff.

The property bequeathed to the grandchildren of the testator remained in the possession of Mrs. Mary Wolff Lewis as usufructuary, or in the possession of her agent in New Orleans, who attended to the renting of the properties and the collection of the rents for Mrs. Lewis until her death. She died at her home in Philadelphia on the 8th of February, 1915.

Mrs. Tyler filed this suit against her six brothers and sisters on the 7th of February, 1916. Alleging that she was born within six months after her grandfather's death and was therefore conceived before he died, she prayed to be recognized as one of the legatees referred to in his will as his grandchildren. Alleging that the property in New Orleans could not be divided in kind among seven co-owners, she prayed that it be sold at public auction to effect a partition by licitation, and that she have one-seventh of the proceeds. Alleging that the real estate agent in New Orleans had retained one-seventh of all the rents collected subsequent to her mother's death, the plaintiff prayed to be recognized as entitled to the sum held by the agent.

The defendants first filed exceptions or pleas of prematurity, of no cause of action, and of prescription of 10 and 30 years, which

pleas were argued, submitted, and overruled. They then answered the petition, contesting the plaintiff's demands, and afterwards pleaded the prescription of 5 years. The latter plea was also overruled, and judgment was rendered in favor of the plaintiff according to the prayer of her petition.

Having appealed from the judgment, the defendants filed in this court of plea of estoppel. They allege that the plaintiff received from her mother donations of stocks worth \$1,200 and a promissory note for \$1,000 and testamentary legacies consisting of a trust fund of \$5,600 and a farm worth \$10,000; that the donations and bequests were given for the express reason that the plaintiff had no share in the Louisiana property of her grandfather's succession, and for the express purpose of compensating her equally with the defendants. They plead that, having accepted the donations and bequests, knowing that the motive of the donor was to compensate the plaintiff for not having a share in the property in Louisiana, she is estopped from claiming also a share in the property in Louisiana. The plaintiff, appellee, has filed a motion to have the plea of estoppel rejected on the ground that the record does not contain any evidence to support the allegations on which the plea is founded.

#### Opinion.

[1, 2] Having been born within 180 days after her grandfather's death, the plaintiff was, according to the laws of nature, and according to a presumption established by article 186 of our Civil Code, conceived before her grandfather died. Not content with that presumption, the plaintiff introduced in evidence scientific proof that she was conceived before the date of her grandfather's death; and the fact is not now disputed by the defendants. They rely, in support of their plea that the plaintiff has no cause or right of action, upon the provision of ar-

ticle 1722 of the Civil Code that a testamentary disposition that does not in terms express any time, either past or future, refers to the time when the will was made. They argue that the testator's expression, "I give and bequeath all the property I may own in Louisiana at the time of my death to my grandchildren, issue of the marriage of my only daughter, Mary, with Alfred E. Lewis," did not expressly or in terms refer to the future, and therefore did not include grandchildren born subsequent to the date of the will.

Article 1722 of the Civil Code is a rule of interpretation of wills—a method of ascertaining the intention of the testator—not a rule for determining when a will shall have effect or be put into execution. Article 1721 of the Civil Code declares that a testamentary disposition couched in the future tense refers to the time of the death of the testator. In the case before us the testator left no doubt that the property he bequeathed to his grandchildren was, not what he owned at the time he made his will, but what he might own at the time of his death; and we think it is equally certain that the grandchildren to whom he intended to give, and did give, all of the property that he might own at the time of his death were those living at the time of his death. That is the interpretation put upon the will by the defendants; for one of them, Francis Lewis, who was born on the 21st of April, 1876, more than 9 months after the date of the will, has been and is yet recognized as one of the legatees.

The plaintiff was entitled to be considered, with regard to her interest in her grandfather's succession—in fact, with regard to any matter concerning her welfare—when he died, as if she had been born before he died. Rev. Civ. Code, arts. 29, 953, 954, 957, 1473, 1482; Marcade, des Succession, vol. 3, p. 36; Toullier, des Succession, vol.

2, pt. 3, p. 57; *Fisk v. Fisk*, 3 La. Ann. 497; *Lewis v. Hare*, 8 La. Ann. 379.

[3] The defendants contend that, in any event, the plaintiff's claim must be limited to one-seventh of two-thirds of the property in dispute. The contention is founded upon the fact that the plaintiff's mother, being a forced heir of her father, was entitled to the légitime of one-third of his estate, and the disposable portion of what he attempted to bequeath to his grandchildren was therefore only two-thirds. It is argued that the acceptance by Mrs. Mary Lewis of the usufruct in lieu of her rights as a forced heir operated as an acceptance of her father's succession and a transfer by her of her légitime of one-third of the estate to the six defendants to whom she referred in her petition. The basis of the argument is that article 1002 of the Civil Code declares that a donation, sale, or assignment, made by a coheir, of his right of inheritance, either to a stranger or to his coheirs, is considered on his part an acceptance of the inheritance, and that article 1003 declares that the same may be said, first, of a renunciation, even if gratuitous, made by an heir in favor of a coheir or of coheirs, and, second, of a renunciation made by an heir to his coheirs indiscriminately, if he receives a price for the renunciation. Our answer to the argument is that the renunciation made by Mrs. Mary Lewis of her rights as a forced heir was not made to or in favor of any designated heir or heirs; nor was any price or consideration received by her. Her renunciation was not a donation or an assignment of her right of inheritance, and it could not possibly be considered an acceptance on her part of anything except the usufruct, which she expressly accepted in lieu of her rights as a forced heir. The renunciation by Mrs. Mary Lewis of her rights as a forced heir inured to the benefit of all of the universal legatees, or legatees under an universal title, the plain-

tiff as well as the defendants. There is therefore no merit in their contention that her claim is limited to one-seventh of two-thirds of the estate.

Taking up now, in their order, the various pleas or exceptions urged by the defendants, we find no merit in the plea of prematurity of the action. The plea is founded upon the contention that the plaintiff should have made proof of her status and rights in the premises, and should have had them recognized, in probate proceedings, before instituting an action for partition or for recognition of her interest in the property. No good purpose could have been accomplished by such circuitous proceedings on the part of the plaintiff. The will of her grandfather had been admitted to probate and ordered executed. A judgment rendered subsequently, in a probate proceeding recognizing the plaintiff as one of the legatees and ordering her sent into possession as such, would not have been binding upon the defendants in the present suit, unless they had been cited and made defendants in such probate proceedings. Their being cited and made defendants once is enough to determine the plaintiff's status and rights in the premises. It is well settled that one who asserts title by inheritance, either legal or testamentary, may prove his or her status as an heir or a legatee as well in a direct action for recognition of title, or for partition of the estate, as in probate proceedings. In fact, an allegation and the proof of title on the part of the plaintiff is essential to maintain an action for partition. See *Thibodeaux v. Thibodeaux*, 112 La. 906, 36 South. 800. An ex parte judgment, recognizing the plaintiff's title, would not furnish proof against a defendant in such case, disputing the plaintiff's title.

Counsel for defendants say that the maxim "*Le mort saisit le vif*" applies, under article 940 of the Civil Code, only to legal heirs,



testamentary heirs, instituted heirs and universal legatees, but not to particular legatees nor to legatees under an universal title. The article does not declare that a legatee under an universal title is not—although it declares that universal legatees are, and that particular legatees are not—vested with seisin, of right immediately after the death of the testator. The only forced heir in this case had renounced her rights as such; and there was no other heir, nor universal legatee, from whom the plaintiff could demand possession. Her demand in this suit is made against the only parties upon whom the demand could be made.

[4] No argument has been advanced in support of the plea of prescription of 5 years. We assume that the plea is based upon article 3512 of the Civil Code, declaring that actions for the nullity of testaments are prescribed by 5 years. This, however, is not an action for the nullity of a testament. The plaintiff is claiming under and by virtue of the testament.

[5-8] The prescription of 10 years does not apply, for two reasons: First, because the possession of the property held by the usufructuary inured to the benefit of all of the joint owners, the plaintiff as well as the defendants; and, second, because the testament under which the defendants claim the property did not purport to transfer the property to them alone, and the ex parte judgment, recognizing them as the legatees, was not, and did not purport to be, a transfer of title.

The plea of prescription of 30 years is founded upon articles 3548 and 3499 of the Civil Code. Article 3548 declares that all actions for immovable property, or for an entire estate, as a succession, are prescribed by 30 years; and article 3499 provides that the ownership of immovables is prescribed for by 30 years without any need of title or possession in good faith. Article 1305 of the Code makes it plain that the owner or owners

of only an undivided interest in real estate, having possession of the whole, may acquire, by the prescription of 30 years, the interest of a co-owner not in possession.

Without considering the question whether the possession held by the usufructuary for more than 30 years could inure to the benefit of the defendants alone and operate to the prejudice of the other co-owner, we are of the opinion that the prescription of 30 years, being suspended during the minority of the plaintiff, only commenced its course at the date when she attained her majority, and that it was interrupted by the service of citation in this suit within 30 years from that date.

Article 3521 of the Civil Code declares that prescription runs against all persons unless they are included in some exception established by law; but the next following article provides that prescription does not run against minors except in the cases provided by law, and article 3554, in substance, repeats the provision. The cases in which prescription does run against minors are specified in article 3541 of the Code, in the section that treats of the prescription which operates a release from debt; and the only prescriptions specified are those of 1, 3 and 5 years. As it is not specified or provided in the Code, or elsewhere in the law of this state, that the prescription of 30 years runs against minors, that prescription must be included in the general terms or provisions of articles 3522 and 3554 that prescription does not run against minors, except in the cases specified or provided by law.

Counsel for the defendants cite the decision in *Smith v. Gibbon*, 6 La. Ann. 687, to the effect that minority does not interrupt, but only suspends, the course of prescription. And from that they argue that the prescription of 30 years, which was only suspended during the 21 years of the plaintiff's minority, had only 9 years longer to run to complete its course. There is no occasion here, however,

to observe a distinction, or recognize the difference in effect, between an interruption and a suspension of prescription, as there was in the case cited. There the prescription of 10 years *acquirendi causa* was pleaded against a plaintiff who had been of age only 3 years and had derived title by inheritance from her mother, during whose lifetime the defendant had held adverse possession more than 7 years. It was held that, as the prescription that was running against the plaintiff's mother was only suspended, not interrupted, by the plaintiff's minority, it resumed its original course when the plaintiff attained the age of majority and had then only three years to run. The doctrine of the decision is that prescription must begin its term anew if it has been interrupted, but not if it has been merely suspended, after having commenced its term. That doctrine does not warrant our holding that the term during which prescription was suspended on account of the plaintiff's minority should be added or tacked to the term when prescription operated against her. Such a ruling would altogether do away with the suspension of prescription during minority. The doctrine of the decision cited does not apply to this case, for the simple reason that there was no one against whom prescription had operated at all when it commenced to operate against the plaintiff.

There is one case in our jurisprudence where it was held that the prescription of 30 years against an action of partition, under article 1305 of the Civil Code (article 1228 of the Code of 1825), was not suspended during the minority of the heir against whom it was pleaded and maintained. We refer to the decision in *Rankin, Tutor, v. Bell et al.*, 2 La. Ann. 486. The only reasons assigned for the ruling were that article 1228 was not put into the chapter (of the Code of 1825) treating of prescription, and that, "from its plain import," the court was of the opinion that the limitation it established was not suspended by minority.

The manifest reason why article 1305 of the Code appears, not in the chapter that treats of prescription, but in the chapter dealing with the partition of successions, is that the article does not establish another prescription of 30 years, but merely affirms that the prescription of 30 years (established by article 3499) applies to co-owners. That is repeated in article 3515, in the chapter on prescription, where it is said that the owner of half of an estate can acquire the other half by the prescription of 30 years.

In *Rankin, Tutor, v. Bell et al.*, the court construed article 1305 (1228) as if it stood alone and embraced all of the law on the subject dealt with. No reference was made to article 3522 nor to article 3554 of the Code (articles 3488 and 3519, respectively, of the Code of 1825), declaring that prescription did not run against minors except in the cases specified by law. The case was referred to in *Rhodes v. Cooper*, 113 La. 604, 37 South. 530; but the court then found it unnecessary, and expressed an unwillingness, either to affirm or overrule the decision. As the decision is not founded upon satisfactory reason—is in fact contrary to the plain language of the Code—we are constrained to overrule it. Our conclusion is that the prescription of 30 years was suspended during the plaintiff's minority, and therefore that the plea cannot prevail.

[9] Referring now to the defendants' plea of estoppel, we find that the plaintiff's contention that there is no evidence to support the allegations on which the plea is founded is correct. When the defendants offered evidence in the district court to prove that Mrs. Mary Lewis had construed her father's will so as to exclude the plaintiff as a legatee, being the only purpose for which the evidence was offered, the plaintiff's attorney urged, and the court maintained, the objection that the evidence was irrelevant to any issue presented by the pleadings. The de-

defendants did not then plead an estoppel, nor offer to amend their pleadings in the district court. They ask now that the case be remanded to the district court, if necessary, for the introduction of the evidence that was excluded when, in reality, the evidence was not admissible under the pleadings. We are unwilling to establish the precedent of remanding a case for the introduction of evidence of facts which, if true, were known by all of the parties to the suit before it was filed. One of the defendants, a man 43 years of age, was present and testified at the trial, and it appears that he had assisted in preparing for the defense of the suit. There is no consideration of equity to prompt us to depart from the rule that a plea of estoppel filed in an appellate court, based upon allegations of facts antedating the trial of the case, cannot be allowed or considered unless the record contains evidence of the facts alleged.

The judgment appealed from is affirmed.

#### On Application for Rehearing.

**PER CURIAM.** It is said in the application of the defendants for a rehearing that we should have reserved their right to compel the plaintiff to collate, and to compel her to account for the property and money received from her mother, by way of opposition, if necessary, to a homologation of the partition proceedings to be had hereafter in this case.

[10] As we did not pass upon or consider the merits of the issues raised or attempted to be presented by the plea of estoppel filed originally in this court, our refusal to consider the plea should not have the effect of preventing the defendants' asking for a collation, by way of opposition to the homologation of the partition proceedings.

The decree heretofore rendered is therefore amended so as to reserve whatever rights the defendants have or may have to require

the plaintiff to collate, by way of opposition to a homologation of the partition proceedings to be had herein. The petition for a rehearing is denied.

(78 South. 482)

No. 21440.

**BRYCELAND LUMBER CO., Limited, v.  
KERLIN et al.**

(April 1, 1918.)

*(Syllabus by the Court.)*

**LIMITATION OF ACTIONS §28(1)—PAYMENT  
OF MANAGER'S PERSONAL DEBTS.**

An action by a corporation to recover from its manager the amount of his personal debts, paid by him or under his direction with funds of the corporation and without authority, is subject, not to the prescription applicable to the original debts so paid, but to that of ten years, under article 3544 of the Civil Code.

Appeal from Third Judicial District Court, Parish of Bienville; William C. Barnette, Judge.

Action by the Bryceland Lumber Company, Limited, against T. J. Kerlin and others. Judgment for plaintiff, and T. J. Kerlin appeals. Affirmed.

Wimberly, Reeves & Dormon, of Shreveport, for appellant. Goff & Barnette, of Arcadia, for appellee.

**O'NIELL, J.** This is an action to recover \$7,028.60 paid by the plaintiff for debts due by the defendants. The suit is similar to the two cases of the same title reported in 137 La. 1, 68 South. 192, and 140 La. 867, 74 South. 177.

The only serious defense made is a plea of prescription of one and three years, which plea was rejected by the district court. T. J. Kerlin alone has appealed from the judgment rendered against him and the T. J. Kerlin Lumber Company in solido.

The debts paid by the plaintiff, to recover

which this suit was brought, were due by the T. J. Kerlin Lumber Company, whose property was sold by T. J. Kerlin to the plaintiff under a written contract of warranty on Kerlin's part against such debts. He owned or controlled all of the capital stock of the corporation whose property he transferred to the Bryceland Lumber Company. Thereafter, as vice president and general manager of the latter corporation, he had the accounts credited to his and the T. J. Kerlin Lumber Company's creditors, on the books of the Bryceland Lumber Company, and caused the debts to be paid with funds of the Bryceland Lumber Company. A suit by the latter to recover the amount so paid is not subject to the prescription of one year nor of three years, but to that of ten years. R. O. C. 3544; *Reddick v. White*, 46 La. Ann. 1208, 15 South. 487.

The judgment appealed from is affirmed.

(78 South. 482)

No. 21433.

DE MOSS v. SAMPLE et al.

(April 1, 1918.)

(*Syllabus by the Court.*)

1. MINES AND MINERALS §55(1) — SEVERANCE—EXCEPTION.

The elements of ownership in land may be severed. The owner may sell surface rights, and except from the sale the minerals below the surface, and reserve to himself the right to mine those minerals; whether the minerals be in place, like coal, sulphur, etc.; or, whether they be migratory, like oil and gas appear to be.

(*Additional Syllabus by Editorial Staff.*)

2. MINES AND MINERALS §47 — OWNER OF MINERALS.

The ownership of the surface of the earth carries with it the right to the minerals beneath and the consequent privilege of mining and extracting them.

3. DEEDS §137—"EXCEPTION."

An "exception" is of something that is part of the thing granted, existing at the time of the grant, as coal or oil in the land and upon which

the grant does not operate and which remains in the grantor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exception.]

4. DEEDS §141—"RESERVATION."

A "reservation" is the creation in behalf of the grantor of some new right issuing out of the thing granted, usually an incorporeal hereditament; something which did not exist as an independent right, before the grant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reservation.]

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

Jactitation suit by William De Moss against A. N. Sample, S. G. Sample, and the Producers' Oil Company, converted into a petitory action by defendants' claim of ownership to oil and gas and reserved mineral rights. Judgment for defendants, and plaintiff appeals. Affirmed.

Scheen & Blanchard, of Shreveport, for appellant. Hampden Story, of Shreveport, for Producers' Oil Co. Hall & Jack, of Shreveport, for appellees Sample. Foster, Looney & Wilkinson and J. C. Pugh & Son, all of Shreveport, amici curiæ.

SOMMERVILLE, J. This is a jactitation suit brought by plaintiff, who alleges that he acquired title to the land in dispute from two of the defendants, A. N. and S. G. Sample, in the year 1911, and that he has been in quiet possession thereof since that time, until shortly before the filing of this suit, in 1914. He further alleges that the defendants, the two Samples and the Producers' Oil Company, have disturbed him in his possession by entering upon the estate, and by extracting oil therefrom.

Defendants answer, admitting that plaintiff bought the land in question at the time indicated, but allege that in selling to him, the vendors, the two Samples, made this written stipulation in their favor in the deed of conveyance:

"The vendors herein reserving the oil, gas and mineral rights in and to the said described property, with the right of ingress and egress, but such right to be exercised with as little damage as possible in the operation thereof and without damage to crops, buildings and improvements; but, in the event that it should be necessary to damage crops, buildings and improvements in the exercise of the said mineral rights, and the right of ingress and egress, then the vendors or their assigns to pay such damages as may be suffered by the vendee or his assigns."

The action was thus converted into a petitory action by the Samples claiming ownership of the oil and gas in or under the land and of the mineral rights reserved in the transfer of the land by them to plaintiff.

It is contended by plaintiff that by the reservation of the minerals made by defendants, the Samples, in the title deed, in the land or under the surface of the earth, as well as mineral rights, it was not the intention of the parties that plaintiff did not take the land in its entirety; and that the so-called reservation of mineral rights was of an uncertain thing, which could not be sold, and, if passed, was passed without consideration on the part of the defendants.

The defendants, the Samples, entered into a contract of lease with the Producers' Oil Company, wherein all of their rights were transferred to said company; and that company has been made a party defendant.

There was judgment in favor of defendants, and plaintiff has appealed.

[1] The agreement entered into between the parties is clear and unambiguous in its terms. It therefore has the effect of a law upon them, and its terms must be performed in good faith, unless the agreement is in violation of law. As the law does not forbid the owner of land to reserve to himself the minerals lying under the surface thereof, or the right to thereafter enter upon said lands for the purpose of exploring for those minerals, such reservation properly became the subject, or motive, of the contract between the parties.

"Individuals have the free disposal of the property which belongs to them, under the restrictions established by law." C. C. art. 484.

It lies within the power of contracting parties to make any matter material to their contract, if not against the public policy of the state, although such matter may seem to be of little or no value to either party to the contract. When the parties themselves have made certain matters the bases of a contract the courts will not assume to correct the intention or understanding of the parties as to the materiality of such matters. Where parties, in a contract of sale of land, agree that the vendor shall reserve to himself, or except, from the sale the minerals in or under the land, the title to the minerals and the right to explore for them remain in the vendor, and the minerals do not pass to the vendee. Plaintiff cannot be heard to contend that he intended to take the land in its entirety; that neither party supposed that there was oil or gas in or under the land; and that he did not intend to buy the land without the oil and gas, if they were there.

The fact is, plaintiff bought the land, except "the oil, gas and mineral rights in and to the described property." Defendants therefore did not sell, and plaintiff did not buy, "the oil, gas and mineral rights in and to the described property." The title thereto remained in the Samples. There is no law which forbids the owner of land to sever its constituent parts, and sell one or more of those parts and retain the remainder. And, when he does retain or except from the sale a part, there is no consideration due the vendee. The latter did not transfer the part excepted in the sale made to him.

Ordinarily, oil and gas, while in the earth, are not the subject of ownership separate from the soil.

"The ownership of the soil carries with it the ownership of all that is directly above and under it." C. C. art. 505.

But the owner may dismember his ownership and sell his land, excepting and reserving to himself the oil, gas, and mineral rights therein. Or he may sell the coal to one, iron to another, and so on.

There has been little legislation in this state on mining contracts, and there have been few adjudications on the subject. In the *Rives Case*, 133 La. 178, 62 South. 623, where mineral rights had been granted by the owner of land for a term, the court construed the contract to be a lease; and, in such case, it was said in the syllabus that:

"Oil and gas while in the earth are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil or gas that is in the ground, but of such part as the grantee may find, and passes nothing except the right to explore for the same under the terms of said contract."

The court did not hold that a sale could not be made of the surface with a reservation of the minerals and the right to explore for them by the vendor. It was there held that a contract for the exploration of lands for minerals, although designated a sale by the parties, was the grant of an exclusive right to search for, take, and appropriate the minerals mentioned in the contract; in other words, it was held to be a lease of land for mining purposes.

The parties to the contract here have agreed that the ownership of the oil and gas should be distinct from the ownership of the soil, or surface of the earth. The vendors did not sell or grant to the vendee the oil and gas in the soil; they excepted them from the sale; and they reserved to themselves and their assigns the right of ingress and egress to explore for and take the oil and gas therefrom. The oil and gas, when reduced to possession by the vendors or their assigns, became the personal property of the vendors or their assigns. Their title then became perfect therein. Until reduced to possession the title was in the Samples. The owners of the

surface had no proprietary interest therein.

The parties have divided the property in what might be called horizontal planes. The vendors transferred to the plaintiff all the surface rights on the land, and they reserved to themselves certain planes beneath the surface. It is a common thing for the owner of a portion of the earth's surface or crust to convey the coal or other minerals beneath the surface. Then the owner has parted with a strata or stratum in the midst of what was once his, and he continues to own from the center of the earth to the bottom of the part sold. And from the top of the part sold to the clouds is owned by the vendor. Ordinarily, the sale or leasing of a stratum, by implication, carries with it the right to use as much of the surface as may be actually necessary to mine from the stratum conveyed. That is also true as to the owner who excepts a stratum from the sale of his land to another. In such case, we have what the Code terms "imperfect" ownership; and it is provided in article 2449, C. C., that:

"Not only corporeal objects, such as movables and immovables, live stock and produce, may be sold, but also incorporeal things, such as a debt, an inheritance, the rights, titles and interests to an inheritance, or to any parts thereof, a servitude, or any other rights."

The state Legislature, in act numbered 31, of 1910, p. 50, has fixed the public policy of the state with reference to the severance of the elements of the ownership in land, by providing for and "authorizing the register of land office to sell and convey to the city of Shreveport, the bed of what is known as Cross Lake in the parish of Caddo, and fixing the terms and conditions of such sale, reserving to the state of Louisiana all minerals and mineral rights on and under said lands."

The Legislature could not have been certain that oil and gas were under the lands referred to, or that they would remain there if

they were there; yet, nevertheless, it reserved to the state those minerals, and the right to extract them from the earth, if they were there, without consideration passing to the city of Shreveport.

A sale or reservation of the mineral rights on property, of course, does not constitute a sale or reservation of so many tons of coal, iron ore, barrels of oil, or feet of gas; nevertheless, such a contract may convey or reserve the exclusive right to exploit the property for any of the minerals designated in the act of conveyance or reservation; and to say that such a contract is void for lack of certainty as to the thing sold, or reserved, or contrary to any principle of public policy of the state, would, in a way, relegate the most valuable property in the state to the category of property *de hors commerce*.

The Legislature, at the same term, proposed a joint resolution, amending article 229 of the Constitution of the state, by providing that:

"Those engaged in the business of severing natural resources as timber and minerals, from the soil or water, whether they thereafter convert them by manufacturing or not, may also be rendered liable to a license tax," etc. Act 154, 1910, p. 234.

Again, that same Legislature, by Act 232, p. 393, authorized the lessees or owners of contracts granting the rights to explore and develop lands for oil, gas, and other minerals, the right to mortgage such leases, or contracts.

At the extra session of 1912, the Legislature submitted a proposed amendment to the Constitution by act numbered 12, p. 13, which provides for the assessment and taxation of property, including "all mines of sulphur, salt, or other minerals, all oil or gas wells, all stone quarries, sand, gravel, or shell pits." And, in the same proposed amendment, it was provided that:

"All operating mines of sulphur, salt, or other minerals, all oil or gas wells, all stone quarries,

sand, gravel and shell pits, shall be taxed upon a percentage of the gross value of the product at the mouth of the mine, well, quarry or pit."

The state, by Act 209, 1912, p. 437, as amended by act numbered 10, 1916, p. 37, provided an annual license tax to be paid by persons engaged in "severing natural products, including all forms of timber, turpentine, and minerals, including oil, gas, sulphur and salt from the soil."

And, by Act 296, 1914, p. 605, the police juries of the several parishes were authorized to levy annual license taxes upon persons thus engaged. See, also, Act 144, 1908, p. 200; Act 172, 1910, p. 255; Act 197, 1910, p. 332; Act 254, 1910, p. 423; and Act 296, 1914, p. 605.

It has been usual heretofore to tax real estate as a unit in this state; but, as different elements of the land are capable of being severed and separately owned, the state now authorizes separate assessments against the owners of the several parts. Accordingly, if different parts of land have been severed, and are held by different individuals, the land may be taxed to one, the timber to another; or, land to one, and coal to another, etc. And in the case of *Downman v. State of Texas*, 231 U. S. 353, 34 Sup. Ct. 62, 58 L. Ed. 264, where the state of Texas brought suit against Downman to collect taxes on "mineral rights," owned by him in 50,000 acres of land, the court held that such assessment was valid where the owner of the surface was also assessed and taxed for the land.

[2] It need not be restated that the ownership of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining and extracting them. The question here presented is: Do the peculiar substances, oil and gas, which are here involved, the manner in which they are held in their reservoirs, the methods by which and the time when they may be reduced to

actual possession, or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth; except for that one point of similarity they greatly differ.

"Petroleum, gas and oil are substances of a peculiar character, and decisions of ordinary cases of mining for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown v. Vandergrift*, 80 Pa. 142, 147; *Westmoreland Natural Gas Co.'s Appeal*, 25 Wkly. Notes of Cas. (10) 103." *Brown v. Spilman*, 155 U. S. 665, 669, 870, 15 Sup. Ct. 245, 247 (39 L. Ed. 304); *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 202, 20 Sup. Ct. 576, 44 L. Ed. 729.

Under such conditions, the oil and gas, in their natural state, under the surface of the ground, may be said to be not owned by the owner of the land, until they are reduced to possession by him. If they are reduced to possession by an owner of adjoining land, they belong to him.

The Samples, owners of the land, reserved to themselves the ownership of these substances of a peculiar nature, oil and gas, which were in and under the ground when they transferred the land to plaintiff. And they continued to be the owners thereof until they assigned their rights thereto to their codefendants.

The right to sever the minerals from the surface so as to create a separate estate is as old as is the common law, and is of universal application in this country. It adds value to property, and makes it possible for the owner of the soil to sell and convey the underlying mineral estate, frequently for a large con-

sideration, while he retains the surface for agricultural and other purposes.

And the exception of the minerals from the sale of the land by the vendor does not impose any limitations upon the vendee freely to convey the interest in the land conveyed to him.

In the case of *Strother v. Mangham*, 138 La. 437, 70 South. 426, where the owner of the land sold to another the oil and gas and the right to prospect therefor, the court held the contract to be legally binding. See, also, *Anse La Butte Oil & Mineral Co. v. Babb*, 122 La. 415, 47 South. 754; *Hanby v. Texas Co.*, 140 La. 189, 72 South. 933; *Fallin v. Stovall*, 141 La. 220, 74 South. 911.

It is well settled that when the owner of land conveys to another oil and gas, which have not been developed, that oil or gas becomes property distinct from the "surface," as the expression is in the books. The oil and surface are then distinct properties, under two ownerships; the oil, a real and corporeal property separate from the surface or soil itself. Being a part of the land, and thus owned by the owner of the land, he can sever that ownership, and except or reserve the oil and gas to himself, as was done by the Samples in this case.

"They (oil and gas) are subjects of grant and conveyance—just as much so as coal or stone buried in the soil." *Thornton, Oil and Gas*, §§ 20, 52.

When thus severed in ownership, the owners own two separate interests, and are not cotenants. When thus severed in ownership, the minerals become a separate entity and their ownership is attended with all the burdens and incidents peculiar to the ownership of land. Oil and gas in place are minerals, and they fall under these principles. Therefore, when the Samples, in the deed to De Moss, reserved the oil and gas and mineral rights, the ownership of those things remained as they had been before, vested in them. De Moss is the owner of the surface, and



the Samples are the owners of the oil and gas, as separate property from the surface. It makes no difference that the oil and gas are fluent and wandering for the present question. The Samples might have lost, or they may lose, the oil and gas by migration from the land. But the oil and gas will be deemed to be in the land for the question before us. The ownership of the oil and gas was in the Samples before De Moss acquired title to the land. The oil and gas were vested in them as a real corporeal entity and property—a solid substantial estate and property, not a mere license to take them—and they remained so after the deed to De Moss. There was no change in ownership.

[3, 4] The deed in this case "reserves," it does not "except," the oil and gas.

"'Except' would have been the proper word, because an exception is of something that is part of the thing granted, existing at the time of the grant, as coal or oil in the land. The part excepted is already in existence, and is said to remain in the grantor. The grant has no effect upon it. A 'reservation' is the creation, in behalf of the grantor, of some new right issuing out of the thing granted, usually an incorporeal hereditament—something which did not exist as an independent right, before the grant. Sometimes the terms 'exception' and 'reservation' are used synonymously." Tiedeman, R. Prop. 843.

Severance may be by "conveyance of the mines or minerals only, or by a conveyance of the land, with reservation or exception as to the mines or minerals." 20 Am. & Eng. Encyc. of Law (2d Ed.) 772.

It makes no difference whether the word used is "except" or "reserved" the intent being the matter to be considered. *Preston v. White*, 57 W. Va. 278, 50 S. E. 236.

"A reservation or exception of all the mineral in the tract conveyed is a separation of the estate in the mineral from the estate in the surface. \* \* \* Of course, what is true of a reservation is also true of an exception. In case of either a reservation or an exception, the grantor has a right to enter on the surface with all the usual necessary appliances, to remove the mineral, without any express authority reserved to that effect. In case of a reservation of minerals, such minerals descend to the grantor's heirs." Thornton, § 303, p. 354.

In the case of *Minor's Heirs v. City of New Orleans*, 115 La. 301, 38 South. 999, where the owner of an interest in a parcel of land fronting the Mississippi river sold said interest to the city of New Orleans, excepting and reserving, however, his interest in all future batture accretions, it was held such a stipulation was a lawful agreement, and should be enforced.

The judgment appealed from is affirmed.

O'NIELL and LECHE, JJ., concur in the decree.

(78 South. 486)

No. 22681.

FIREMEN'S INS. CO. v. HAVA.

HAVA et al. v. LIVAUDAIS.

(April 1, 1918.)

(Syllabus by the Court.)

1. COURTS §50—ORIGINAL SUIT—SUBSIDIARY SUIT—RULE OF COURT.

Under section 9 of rule 8 of the rules of the civil district court for the parish of Orleans, requiring suits or proceedings growing out of other suits or proceedings previously pending (such as suits or proceedings to restrain or regulate the execution of process in suits previously pending) shall follow the allotment or assignment of the original suits, a suit to restrain the seizure, under a judgment rendered in division A, of a fund held under orders of the judge of division E in a suit between the same parties, is within the jurisdiction of division E, if the plaintiff in the injunction suit does not attack or question the legality or regularity of the proceedings had or judgment rendered or process issued in division A, but merely disputes the right of the seizing creditor to contest his or her title to the fund held in division E.

2. JUDGMENT §728—CONCLUSIVENESS—INCIDENTAL OR COLLATERAL QUESTION.

An incidental or collateral question on which depends the principal question at issue between the parties to a suit, although not disputed by either of them, is foreclosed by a judgment on the main issue.

3. JUDGMENT §660—PLEA OF RES JUDICATA—VALIDITY OF JUDGMENT.

When one of two co-owners of property has obtained a personal judgment against the other for reimbursement of the latter's share of expenditures made by the former for insurance and taxes on the property, and the judgment is

pleaded by the party against whom it was rendered as *res judicata* in a subsequent suit in which the party who obtained the judgment attempts to dispute the title of the other party, the one who obtained the judgment cannot successfully question its validity on the ground that he was only entitled to a judgment in rem for reimbursement for the taxes paid, and was not entitled to any reimbursement for the insurance premiums because he had no right to insure the other party's interest in the property.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

A suit for partition by Mrs. M. E. Hava and others against Alfred F. Livaudais, and supplemental petition by plaintiff, praying that her husband, Dr. Adrian F. Hava, be cited to show cause why she should not prosecute her suit, with answer by her husband, and answer by defendant Livaudais, praying for partition and for the allowance of a reconventional demand, consolidated with interpleader by the Firemen's Insurance Company. Judgment in the consolidated cases, ordering a partition and allowing the reconventional demand, and discharging the interpleader, on appeal by Dr. Adrian Hava was affirmed (140 La. 638, 73 South. 708), and thereafter Mrs. M. E. Hava obtained an injunction in the original consolidated cause against A. E. Livaudais, and he appeals. Affirmed.

See, also, 141 La. 347, 75 South. 76.

McCloskey & Benedict and Raymond Gauche, all of New Orleans, for appellant. Charles Louque, of New Orleans, for appellee.

O'NIELL, J. In 1894, after Mrs. M. E. Hava had become the wife of Dr. Adrian F. Hava, she bought a certain house and lot in New Orleans in her own name. The deed, containing the recital that the property was purchased with the paraphernal funds and as the separate property of Mrs. Hava, was signed by her husband to authorize her. Thereafter, Alfred F. Livaudais loaned to Dr. Hava \$2,600, for which the doctor gave his promissory note dated May 20, 1912.

Subsequently Dr. and Mrs. Hava separated, but were not divorced. The house and lot bought by Mrs. Hava was advertised and offered for sale for delinquent taxes, and in May, 1914, Livaudais purchased one-eleventh interest in the property at the tax sale for the amount of the taxes due. He had the house insured by the Firemen's Insurance Company against loss by fire. It was destroyed or damaged by fire in October, 1915. The loss was adjusted at \$2,393; and the amount was placed by the insurance company in the hands of its attorney to be paid to the person or persons entitled to it.

On the 2d of May, 1916, Mrs. Hava sued Livaudais for a partition of the property and a division of the insurance money. She prayed to be recognized as entitled to ten-elevenths of the cash in the hands of the attorney of the insurance company, to have the real estate sold at public auction, and to be declared entitled to ten-elevenths of the proceeds. She was not authorized by her husband to institute the suit, but prayed that the judge authorize her. The case was allotted to division E of the civil district court. Livaudais excepted to the plaintiff's proceeding without the authorization of her husband, who was within the jurisdiction of the court.

On the 24th of May, 1916, the Firemen's Insurance Company filed a petition in court, praying that Dr. and Mrs. Hava and A. F. Livaudais be cited to answer and show to whom the insurance money should be paid. The suit was allotted to division A, and on motion of Mrs. Hava it was ordered consolidated with her partition suit in division E. Thereafter Mrs. Hava filed a supplemental petition, praying that her husband be cited to show cause why she should not be authorized to prosecute her suit.

In answer to the suit of the Firemen's Insurance Company, Mrs. Hava alleged that ten-elevenths of the insurance money de-

posited by the company into the registry of the court was her separate property, and she prayed to be allowed to withdraw her part of the fund.

In answer to the suit of Mrs. Hava, Livaudais admitted that the property belonged to Mrs. Hava and him in indivision; that he had purchased one-eleventh interest at the tax sale, and that Mrs. Hava owned the remaining ten-elevenths interest, as set forth in her petition; that ten-elevenths of the \$2,393 insurance money was held for the benefit of Mrs. Hava and one-eleventh for him, by the attorney of the insurance company. He admitted that the property could not be divided in kind, and declared he had, and could have, no objection to the partition prayed for by the plaintiff. Therefore, submitting the matter to the court, he prayed that a partition be decreed, and that the court direct the manner in which it should be effected. Then, assuming the position of plaintiff in reconvention, he alleged that Mrs. Hava was indebted to him in the sum of \$343.37 and interest on the various disbursements from their dates, respectively, for taxes which he had paid on the entire property, ten-elevenths of which amounted to \$290.73, and for insurance premiums which he had paid, ten-elevenths of which amounted to \$52.63. He prayed for judgment against Mrs. Hava for the \$343.37, with interest on each payment from its date and with recognition of a lien on the insurance money and on the proceeds of the sale to be made of the real estate.

In answer to the suit of the insurance company, Livaudais prayed that the insurance money deposited in court be divided between Mrs. Hava and him according to the answer he had filed in her suit for a partition.

Thereafter Dr. Hava answered both the petition of Mrs. Hava to be authorized to prosecute her partition suit and her original

petition praying for a partition. Instead of authorizing his wife to prosecute the suit, he alleged that the property belonged to the community existing between him and his wife, and prayed that judgment be rendered in his favor, declaring him entitled to the insurance money and recognizing him alone to be entitled to institute suit for a partition of the property.

Judgment was rendered in the consolidated cases as follows, viz.: Mrs. Hava was declared entitled to ten-elevenths and A. F. Livaudais one-eleventh of the insurance money deposited in the registry of the court. The real estate was ordered sold at a public auction to effect a partition. Mrs. Hava was condemned to pay Livaudais the \$343.37 claimed in his reconventional demand, with legal interest as prayed for, in reimbursement of ten-elevenths of the payments made by Livaudais for taxes and insurance on the property. The amount deposited by the insurance company into the registry of the court was declared to be the extent of liability of the insurance company, and the latter was discharged from further liability. The costs were ordered paid by the mass; that is, out of the funds to be divided between Mrs. Hava and Livaudais.

Dr. Hava prosecuted an appeal from the judgment, but did not have Livaudais cited as appellee, nor did the latter appear in the case on appeal for any purpose whatever. The only question considered on the appeal—being the only question at issue between the appellant, Dr. Hava, and appellee, Mrs. Hava—was whether the property belonged to the community or was the separate, paraphernal property of Mrs. Hava. The judgment, declaring the property to be the separate property of Mrs. Hava, was affirmed, on the ground mainly that Dr. Hava was estopped from contesting his wife's title by his admission in the deed that the property was purchased with Mrs. Hava's separate,

paraphernal funds and became her separate property. See *Firemen's Insurance Co. v. Hava et al.*, 140 La. 638, 73 South. 708.

In the meantime, that is, after Mrs. Hava had filed her partition suit, but before Livaudais answered it, he filed suit against Dr. Hava on the note for \$2,600, and obtained judgment by confession, in division A of the civil district court. And, having come to the belief that the property that stood in the name of Mrs. Hava was in reality bought with community funds, and therefore belonged to the marital community between Dr. and Mrs. Hava, Livaudais obtained a writ of *fi. fa.*, and had ten-elevenths of the insurance money in the registry of the court seized to satisfy his judgment of \$2,600 against Dr. Hava.

Mrs. Hava then filed a petition in the original consolidated cases in division E of the civil district court, and obtained a writ of injunction to prevent a disposition of her ten-elevenths interest in the funds in the registry of the court, to satisfy the judgment against her husband. She alleged that the fund, being the proceeds or avails of the insurance on her separate, paraphernal property, belonged to her separately; that Livaudais, by purchasing one-eleventh interest in the property for taxes assessed in her name, had thereby acknowledged her title to the property. She pleaded that the question of her title to ten-elevenths of the property and of the fund in the registry of the court became *res judicata* by the judgment rendered in the partition suit.

When the judgment rendered by this court in the partition suit became final, she invoked the supervisory powers of the court to prevent an interference with the distribution of the fund in the registry of division E of the civil district court in accordance with the judgment. This court declined to exercise supervisory jurisdiction, mainly because the relator had submitted the matter for decision by her injunction suit in the dis-

trict court. See *Firemen's Insurance Co. v. Hava*, 141 La. 347, 75 South. 76.

Judgment was rendered in favor of Mrs. Hava, as plaintiff in the injunction suit, perpetuating the writ of injunction. The reasons for judgment were announced orally, but it is admitted that the judgment was based upon the pleas of estoppel and *res judicata*.

A. F. Livaudais, as defendant in the injunction suit, prosecuted this appeal, and assigned as errors: First, that the judge of division E of the civil district court had no jurisdiction to arrest or interfere with the execution of a judgment rendered by the judge of division A; second, that the plea of *res judicata* should not have prevailed, because appellant's appearance as a party to the partition suit was not in the same capacity as that in which he was made defendant in the injunction suit; and, third, that there was no estoppel by plea in the partition suit, because the question, whether the property belonged to Mrs. Hava separately or to the marital community between her and her husband, was not a material issue between Mrs. Hava and him, Livaudais, in the partition suit, and was in fact never put at issue between them until she filed her injunction suit. The appellant died, after the case was argued and submitted, and his widow, having qualified as testamentary executrix, was made party hereto as appellant.

#### Opinion.

[1] In support of his contention that the judge of division E of the civil district court had not jurisdiction of the injunction suit, appellant's counsel refer us to section 9 of rule 8 of the rules of the civil district court, *viz.*:

"Suits or proceedings, not in their nature original, but growing out of suits or proceedings previously pending, such as actions of nullity of judgment, or to restrain or regulate the execution of process, mesne or final, in suits previously pending, shall not be docketed as sepa-

rate suits, but shall be treated as parts of the original suits out of which they arise, and be docketed and numbered as parts of such suits and follow the allotment or assignment to the respective divisions of the court which shall have been made of the original suits."

The injunction suit of Mrs. Hava, to restrain or regulate the execution of the writ of fieri facias that issued in the suit of A. F. Livaudais v. Adrian F. Hava, was not founded upon any cause pertaining to the proceedings had or judgment rendered in that suit. She did not question the legality or regularity of the proceedings had, the judgment rendered, or the writ that issued in that suit, nor dispute the right of Livaudais to have the writ executed by seizing and selling any property of Dr. Hava or the community. She contested only the right of Livaudais to seize, as the property of Dr. Hava or of the community, the fund held in the registry of the court as her property, under orders rendered by the judge of division E, in her partition suit.

Our opinion is that, under the rule quoted, the judge of division E had jurisdiction of a suit between Mrs. Hava and Mr. Livaudais involving only the question whether the fund held as the separate property of Mrs. Hava under orders previously rendered by the judge of division E, in another suit between the same parties, was her separate property or that of the community existing between her and her husband.

[2, 3] Our answer to the second proposition announced in the assignment of errors is that Livaudais did not appear in the injunction suit in a quality or capacity different from that in which he was defendant (and plaintiff in reconvention) in the partition suit, merely because he was sued as co-owner with Mrs. Hava in the partition suit and was enjoined as creditor of the community in the injunction suit. He defended both suits in his individual capacity, for himself alone.

As to the third proposition, admitting, for

the sake of this discussion, that the question whether Mrs. Hava alone or the community was a co-owner of the property with Livaudais, was not a necessary issue between him and Mrs. Hava in the partition suit, it was nevertheless made an issue by his reconventional demand.

She alleged in her petition in the partition suit that she had bought the property with her separate, paraphernal funds, and that her husband had acknowledged in the deed, and again in a subsequent authentic act, that the property was her separate, paraphernal property. In his answer to the petition, Livaudais admitted that Mrs. Hava owned ten-elevenths interest in the property "as set forth in her petition," which was as her separate, paraphernal property. On that admission of Mrs. Hava and Livaudais, and on proof to the satisfaction of the judge, that the ten-elevenths interest in the property belonged to Mrs. Hava, Livaudais obtained judgment against her for ten-elevenths of the amount he had expended for insurance and taxes on the property. Although there was no dispute between Livaudais and Mrs. Hava that the ten-elevenths interest in the property belonged to her separately and not to the community existing between her and her husband, the judgment condemning her to reimburse Livaudais for ten-elevenths of the amount he had expended for insurance and taxes on the property was, in effect, a decree that ten-elevenths of the property belonged to her separately, and that the expenditure was made for her separate benefit.

It is argued by the learned counsel for appellant that he was only entitled to a judgment in rem for reimbursement of the amount expended for taxes, and that he was not entitled to any reimbursement of the insurance premiums, because he had no right to insure Mrs. Hava's interest in the property. Those questions might and should have been considered, if they had been propounded, as a

defense to Livaudais' reconventional demand in the partition suit; but it is too late for Livaudais to question the justness of his demand after having obtained a final judgment on it.

[4] The allegation of Livaudais that he was deceived by the declaration of Dr. and Mrs. Hava that the property was bought with her paraphernal funds, and that he was not informed that their declaration was false until the judgment in the partition suit had become final, is of no importance. It may well happen, after a judgment in a suit to set aside a contract made in fraud of the rights of a creditor of one of the contracting parties has become final, that evidence is discovered that would have produced a different result if it had been discovered before or during the trial. But it will not do to reopen a case to consider newly discovered evidence after the time allowed for a new trial on that ground has passed.

The appellee prays for damages for a frivolous appeal, but the earnestness and ability displayed by the learned counsel for appellant in the prosecution of the appeal convince us they were very serious and hopeful in taking the appeal.

The judgment is affirmed, at appellant's cost.

(78 South. 553)

No. 22936.

TALBOT v. NEW ORLEANS LAND CO.

In re NEW ORLEANS LAND CO.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER  $\S$  112(1), 129(5) — SALES — CONTRACT FOR SALE — "GOOD AND SUFFICIENT WARRANTY TITLE" — BREACH — RESCISSION.

Where, under a contract between an owner of real estate and another, the obligation is imposed upon the owner to make "a good and sufficient warranty title," when certain condi-

tions shall have been complied with, and the right to demand such title has been conferred upon the other contracting party, and, the conditions having been complied with, the owner tenders a title which is incumbered by an inscription showing pending litigation, such tender amounts to an active violation of the contract, an action will lie for its rescission, and for the recovery of money paid thereunder, and the owner cannot be heard to say that the contract itself is a sufficient title, and that none other is needed, since the contract itself is conclusive to the contrary.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Good and Sufficient Title.]

2. VENDOR AND PURCHASER  $\S$  112(1), 129(5) — PROMISE TO SELL — RESCISSION BY PURCHASER — CONTRACT FOR TITLE — CONSTRUCTION.

The provision of the Civil Code (article 2462) to the effect that "a promise to sell amounts to a sale" has no application to a case in which the parties have otherwise agreed; nor has the doctrine that a buyer in possession has no right of action to rescind a sale for an alleged defect in the title conveyed to him, save in case of his eviction, since the seller warrants the possession, but cannot foresee or prevent attacks which may be unfounded upon the title, whereas the obligation to furnish a good and sufficient warranty of title means a title which is not involved in or threatened with litigation, and the obligor who is unable to comply with that obligation is in the same predicament as the seller who is unable to protect the possession of his buyer.

Action by Paul T. Talbot against the New Orleans Land Company. A judgment of the Court of Appeal, Parish of Orleans, affirmed a judgment of the district court, in favor of plaintiff, and defendant applies for a writ of review. Judgment affirmed.

Charles Louque, of New Orleans, for applicant. Johnston Armstrong, of New Orleans, opposed.

MONROE, C. J. On April 8, 1910, the defendant (applicant before this court) and the plaintiff executed, by private signatures, an instrument entitled "Bond for Deed," reading in part as follows:

"This agreement, \* \* \* between the New Orleans Land Company, \* \* \* party of the first part, and P. T. Talbot, M. D., \* \* \* party of the second part:

"Witnesseth, that the party of the first part

hereby agrees to sell and the party of the second part hereby agrees to buy the four certain lots [describing four lots in this city]. The party of the second part agrees to purchase, and does purchase, the above-mentioned property for the sum of \$1,400.00, on the following terms and conditions, to wit: One hundred and forty dollars, paid this day, the receipt whereof is hereby acknowledged, and 63 notes, of \$20.00 each, \* \* \* to be paid to the New Orleans Land Company, at their office No. 427 Carondelet street, New Orleans, La., on or before the 1st day of June, 1910, and each and every month thereafter until the full sum shall have been paid, together with interest at the rate of 6 per cent. per annum. \* \* \* Party of the second part reserves the right to pay any or all of the remaining notes, herein specified, before their maturity, interest being charged from date of note to the time of its payment only.

"In consideration of the covenants and agreements hereinabove made by the party of the second part, the party of the first part agrees, when all payments have been made in accordance with the terms and conditions of this agreement, to deliver to the party of the second part a good and sufficient warranty title to the premises herein described, at a cost of \$3.00 to the party of the second part," etc.

There are other stipulations as to the character and positions of the buildings that may be erected, binding the "party of the second part" for the taxes for 1910 and thereafter, etc.

Plaintiff paid the notes issued by him as thus stated, which had fallen due prior to March 23, 1914, and on that day (through counsel) wrote a letter to defendant saying that he wished to avail himself of the right, reserved in the contract, of paying the notes which had not matured, requesting defendant to designate the notary before whom the company would pass its act of sale, at the cost stipulated, have all the necessary certificates attached, showing the lots to be free from mortgage and had not been sold, and let him know the exact amount due under the contract.

On March 25th following defendant (by its secretary and treasurer) replied, saying:

"I beg to state that Mr. John Wagner, in the Exchange Bank Building, is the notary who will pass the act of sale, \* \* \* and I will thank you to communicate with him in regard to same."

On March 26th defendant furnished a statement of plaintiff's account showing a balance of indebtedness as follows:

Principal .....	\$400.00
Interest to 6/1/14.....	99.20
Taxes, 1910-13.....	32.64
Balance in full.....	\$531.84

And on June 1, 1914, plaintiff appeared before the notary, so named, and, in presence of witnesses, declared that he was ready to accept title to the lots in question and pay the balance of the price, whereupon the notary tendered him a deed, together with mortgage and conveyance certificates in the name of defendant, upon which (mortgage certificate) there appeared the inscription:

"Notice of suit in favor of the Leader Realty Co., Ltd., as per order of Civil District Court, No. 91,800, dated Dec. 8/09, recorded Dec. 10/09, in the mortgage Book 978, folio 461."

Plaintiff thereupon refused to accept the deed because of the inscription, but tendered the balance of price, and stated that he would have paid the same had the certificate been clear. And thereafter, on June 19th, he brought this suit, praying that the contract between him and defendant be annulled, and that he recover the amounts paid by him to defendant in accordance therewith, together with interest and attorney's fees; and, having obtained judgment as prayed for (save as to the attorney's fees) in the district court, which was affirmed by the Court of Appeal, defendant has brought that judgment before this court for review.

#### Opinion.

[1] The "Bond for Deed" contains no recital of delivery of the property to, or acknowledgment of possession by, plaintiff, and, as a matter of fact, he never went into possession, though he testifies that he does not know that any one would have prevented his doing so. There is no evidence tending to show that he knew, at the time that he enter-

ed into the contract which he now seeks to annul, of the inscription which incumbers the title to the property in question, and we are of opinion that it would not, of necessity, have affected the right which he now asserts if he had possessed that information.

Defendant's obligation, under its contract, was to deliver to him "a good and sufficient warranty title," when he should have paid his outstanding notes, and it was agreed that he should have the right to pay them in advance of their maturities with interest computed only up to the time of payment. Having written to defendant that he desired to make such payment, and requested that he be informed as to the name of the notary before whom the deed would be executed and of the exact amount to be paid, he received a reply giving the exact amount that would be due (including the interest) on June 1st, informing him of the name of the notary who would pass the act, and requesting that he "communicate with him in regard to the same," which plaintiff did, with the result that the notary tendered him a form of deed from which and the certificates attached it appeared that the title was incumbered by an inscription showing a suit by the Leader Realty Company for the recovery of the property, which suit has been since decided by this court adversely to defendant and is now pending, on writ of error, in the Supreme Court of the United States.

Having thus referred plaintiff to the notary for his "good and sufficient warranty title," and the notary having tendered a title which was incumbered by a pending litigation, defendant thereby actively breached its contract, and nothing further was required of plaintiff as a preliminary to the bringing of this suit. According to our reading of the record, however, he made a tender, conditional upon the delivery of the title called for by his contract, of the amount which defendant had informed him would be due on

June 1st, and we do not find that there was any error in the calculation of that amount. The obligation which the contract in question imposed on defendant to convey, and the right which it conferred upon plaintiff to demand a good and sufficient warranty title, are conclusive to the effect that the contract did not, of itself, in the opinions of the contracting parties, convey a title of that description, and that it was their understanding that such a title should be conveyed upon plaintiff complying with certain specified conditions, which, having been complied with by plaintiff, defendant cannot now be heard to say that plaintiff does not need the title thus contracted for.

[2] The provision of the Civil Code (article 2462) that "a promise to sell amounts to a sale" has no application to a case in which the parties have otherwise agreed, nor has the doctrine that a buyer, in possession, has no right of action to rescind a sale for an alleged defect in his title, save in case of eviction, since the seller warrants the possession, but cannot foresee or prevent attacks, which may be unfounded, on the title which he has conveyed; whereas, the obligation to furnish a good title means a title which is not, at the time, incumbered, or involved in, or threatened with, litigation, and the obligor who is unable to comply with that obligation is in the same predicament as the seller who is unable to protect the possession of his buyer.

In *Baldwin v. Morey*, 41 La. Ann. 1105, 6 South. 796, the contract related to a sugar house, the price of which was fixed at \$6,000, and a quantity of land, the price of which was \$30 per acre, and it read "Sold this day," with the stipulation, however, that the price for the whole should be paid in certain annual installments, "and all taxes; when done, Baldwin [the seller], or his heirs, will give a good deed." The payments were not made as required, and the seller having resumed



possession of the property and sued for the rescission of the contract, the court held that there was no sale, but a conditional agreement to sell, and said, among other things:

"Logically viewed; the contract has terminated by failure to comply with the conditions, but as contrary pretensions were set up, and as plaintiff is entitled to have the cloud removed from his title, judgment will be granted as prayed for."

And so, the position of the present litigants being the reverse of those occupied by them in the cited case, it may be said here. The defendant now before the court having failed to comply with the requirement that it should furnish a good and sufficient warranty title, the contract terminated, and plaintiff has the right to have it so declared.

It is therefore ordered that the judgment herein brought up for review remain undisturbed, and that the demands of the applicant with respect thereto be rejected at its cost.

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(78 South. 555)

No. 21421.

MILLER v. TALL TIMBER CO.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §=189(2) — NEGLIGENCE OF FOREMAN—LIABILITY.

Where a lumber company has a general foreman of construction who, with the knowledge and approval of the company, places the working crews in charge of particular members, with instructions to the others to do as they are bade by the members so designated, it is immaterial, for the purpose of determining whether responsibility for the negligent omission to make reasonable provision for the safety of a particular crew, while engaged in their work, rests upon the members of the crew as the fellow servants of each other, or upon the member in charge as the representative of the employer, that such member is not called a foreman; it is enough that he discharges the functions of a foreman, with the authority of the employer, to fix such responsibility upon the employer.

(Additional Syllabus by Editorial Staff.)

2. DAMAGES §=130(2)—PERSONAL INJURY—AMOUNT.

A carpenter sustaining a bruised and strained knee, who was laid up for two months, suffering some pain and a diminished earning capacity, would be awarded \$1,500 on an appeal establishing the employer's negligence.

Appeal from Thirtieth Judicial District Court, Parish of La Salle; George Wear, Sr., Judge.

Action for personal injury by John B. Miller against the Tall Timber Company. From a judgment rejecting his claim for damages, plaintiff appeals. Judgment annulled, and judgment entered in favor of plaintiff and against defendant in a certain sum.

Perrin & Perrin, of Jena, for appellant. White, Holloman & White, of Alexandria, for appellee.

MONROE, C. J. Plaintiff has appealed from a judgment rejecting his demand for damages for a personal injury sustained by him in November, 1913, whilst he was engaged in work for which he was employed by defendant, his allegation being that the accident by reason of which he was injured was caused by the negligence of defendant's representative.

We find from the testimony that plaintiff is a carpenter; that he was employed by Henry De Long, defendant's general foreman of construction, and assigned to work in a crew of which Tom Hamilton was placed in charge, and which consisted of Hamilton, plaintiff, Goff, Warren, and Roy De Long; that the work in which they were engaged at the moment of the accident was an attempt to put one end of a stick of timber, 6x8, 20 (or perhaps 32) feet long, and weighing not less than 250 pounds, as a "cap," upon the top of a certain post No. 4, which was about 9 feet high and stood in the ground at a distance of 20 (or perhaps

32) feet to the westward of post No. 3, upon the top of which the other end of the timber had already been placed, and that the accident was caused by the slipping off, from the top of post No. 3, of the east end of the stick, whilst the crew was handling the west end, with the result that it was wrenched from the control of the men and fell on a bench upon which Warren was standing, whence it rolled to the ground and struck plaintiff, knocking him against the pile of piping (which happened to be there), and inflicting the injury of which he complains. Mr. Hamilton (called by defendant) tells the story of the happening as follows:

"Well, we were putting a 6x6 cap on posts about 9 feet high, I think they were, and we put one end up and went to raise the other end. We ought to have had a man up there to hold that end, but we didn't have any. And we had almost got the end ready to land on the last post when the other end of the cap slipped off. Mr. Warren and Mr. Miller and one other man and myself had hold of the stick, and when it slipped off, of course, we had to drop it. Mr. Miller got caught, and it struck him on the leg and threw him against some pipe that were near and injured his knee. The falling of the timber caused the accident."

At another place, he says:

"There was no (one) holding the cap. We neglected to leave a man there for it."

There is other testimony to the same effect, and there is none to the contrary, save that of the plaintiff, who alleges in his petition and testifies that the cause of the accident was the giving way, for lack of proper bracing, of post No. 4. It is not unlikely that he was working with his back turned in the direction of post No. 3, and, not knowing what had happened there, attributed the sudden wrenching of the west end of the stick of timber from the control of the crew to what seemed to him the most probable cause. The other testimony was, however, admitted without objection, and is conclusive to the effect, not only that the accident was caused by the slipping of the

east end of the stick from the top of post No. 3, but that the slipping resulted from the negligent omission to leave one of the crew at post No. 3, to hold that end in position while the west end was being placed on post No. 4.

Upon the question whether the negligence, which is virtually admitted, should be attributed to any one for whom the defendant can be held responsible, or to the plaintiff himself, or to Hamilton or other members of the crew, upon the theory that they were fellow servants of the plaintiff, the evidence is equally conclusive.

Allen Brown, defendant's assistant manager, says, in his testimony:

"Mr. De Long was the foreman in charge of all construction work outside of the mill proper. He would lay out the work for each crew of men. He would generally put a man who understood the carpenter work to be done in charge and give him two or three helpers. The man in charge of the job was not considered as a foreman."

Mr. De Long was not present when the accident occurred and did not see it, nor does he pretend to have given any directions as to the manner in which the stick of timber should be placed on the top of the posts. He and Mr. Hamilton were in Florida when his testimony was taken, and it was taken under commission by means of identical interrogatories. De Long admits that he had no personal knowledge of the accident, but says that plaintiff made a statement to him shortly after it occurred (which was some seven months before he gave his testimony), and upon that basis he testifies to various conditions that never existed, such as that plaintiff was left at post No. 3 to hold the end of the stick in position, and that it was his duty to have held it. Hamilton testifies that plaintiff was working with him and the other men in their attempt to put the end of the cap on post 4, and that "it was no one's particular duty [to hold the end on post 3] without they were sent up to do it."

Among the interrogatories propounded to De Long and Hamilton, was the following:

"Q. Who was the foreman of the construction gang of which Mr. Miller was a member?"

De Long answered:

"I was."

Hamilton answered:

"Mr. De Long was the foreman."

They were asked on cross-examination:

"Was this a sufficient number of men to do the work assigned, and, if you say that it was, what should each of the men named in your answer have done; was there not a lack of sufficient prudence on the part of the foreman?"

To which De Long made no answer, and Hamilton answered:

"Five men were sufficient. There was no foreman right in that crowd; that is at the time."

They were asked:

"Was the man who was holding the cap on the post skilled in that work?"

To which De Long answered:

"No; it was Miller himself who was holding it."

And Hamilton answered:

"There was no one holding the cap; we neglected to leave a man there for it."

Warren (called by defendant) gave the following testimony:

"He [Miller] was working under Mr. De Long, with the exception Mr. De Long would have a job to do some work and he would have a man at the head of that job. Mr. Tom Hamilton was the man at the head of the work in that transfer, at that time. Q. (by defendant's counsel). He was just a working man, like the balance—made his time with his tools, like the other men?" [which may be called a somewhat leading question to one's own witness—the answer to which was:] "A. Yes, sir; he was a day laborer; of course, I suppose he was held responsible for the work he was doing out there and the work of the two or three men with him."

Plaintiff and Goff testify that they were told by De Long to work under Hamilton, or with Hamilton, and to do as he bade them. George Coleman testifies as follows:

"Q. Who was the general foreman on the construction job? A. Henry De Long. Q. Did

he have straw bosses? A. I suppose so; he had men laying the work out showing the men what to do. Q. Was Tom Hamilton one of them? A. Yes, sir."

E. H. Trichell testifies that there were several bosses on the work that was being done.

[1] So that, to our minds, it is entirely clear that, while De Long was the defendant's general foreman of construction, he, with the knowledge and approval of defendant, delegated a portion of his authority, with respect to particular jobs, to the members of the respective crews that were assigned to those jobs, and that Hamilton, though not a foreman in name, represented the defendant for the purposes of the question here at issue, to the extent that plaintiff was subject to his orders, and was not expected to stay at post 3 and hold the cap in position, or to do otherwise than he did, and that it was the negligence of Hamilton, as defendant's representative, in not requiring plaintiff, or some one else, to perform that function, which caused the accident.

We find no room for the application of either the doctrines of "assumption of risk," or "fellow servant."

[2] The principal injury sustained by plaintiff was to one of his knees. Testifying more than eighteen months after the accident he said that he was laid up for two months, that he had suffered more or less ever since, and that his earning capacity had been reduced. Being asked as to the then condition of his knee, and other questions, he replied:

"Well, it is perished a little—to a certain extent—and, on the inside it is dented where the timber fell on it, against that pipe, and the large bone in my leg is bursted. \* \* \* It has caused me to lose work on several different jobs. \* \* \* I can't climb or do heavy work like I could before."

The surgeon who attended him (at the instance, as we understand, of defendant) testified that he found that defendant's knee had been bruised and apparently sprained,

that he did not remember to have observed any broken bones, and saw no reason why the injury should be permanent; that plaintiff should have been disabled a couple of months or ten weeks; that no X-ray was taken; and that he could not say positively what the extent of the injury to the knee was; that he did not think there was any dislocation, but was unable to say positively. There appears to have been no attempt to have plaintiff's knee examined at the time of the trial, and save that there were several witnesses who testified that they noticed that plaintiff had been injured, appeared to be lame, used crutches, etc., the foregoing is about all that the record affords as to the extent of the injury.

We have concluded, under the circumstances, to assess the damages at \$1,500, and in that connection we think it proper to say that plaintiff has not been represented in this court, and to suggest that litigants who fail to prosecute their appeals are in some danger of having them dismissed. It may be further remarked that the accident from which this suit arose occurred before the enactment of the statute upon the subject of the liability of the employers, known as the Burke-Roberts Act (Act No. 20 of 1914).

For the reasons thus assigned, it is ordered that the judgment appealed from be annulled, and that there now be judgment in favor of plaintiff and against defendant in the sum of \$1,500, with costs.

(78 South. 557)

No. 21347.

WINBUSH v. TEXAS & P. RY. CO.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by Editorial Staff.)

MASTER AND SERVANT §137(3)—INJURIES TO SERVANT—ACCIDENT.

Where a railroad's locomotive wiper, on the footboard of the tender of a switch engine

to hang up his coat and lantern, preparatory to riding home, fell off between the rails, and was crushed by the ash pan of the engine and scalded, the railroad was not liable to him as for negligence in not having given him warning of the starting of the engine by ringing the bell, and in not having kept a better watch ahead, so as to have discovered his predicament between the rails sooner and stopped the engine; the bell having been tapped, and the engineer not having looked ahead, because his attention was momentarily turned elsewhere.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by Richard Winbush against the Texas & Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Alford & Liebler, of Alexandria (Mathews & Peters, of Winnfield, of counsel), for appellant. William H. Peterman, of Alexandria, and Howe, Fenner, Spencer & Cocke, of New Orleans, for appellee.

PROVOSTY, J. At 7 o'clock on a drizzly September morning, after a rainy night which plaintiff had spent wiping locomotives, shoveling coal into their tenders, and seeing to their fires, plaintiff got on the footboard of the tender of a switch engine, which he had just finished attending to, and which was about to back on its way to the place where its switching work was to be done. He says that his object was to rid himself of his rain coat and lantern by hanging them there, preparatory to ascending into the cab for riding home, as he was in the habit of doing, and that as he turned to step off of the footboard, while he still had hold of a rod there, the sudden starting off of the engine threw him off. He fell between the rails, and when the ash pan of the engine reached him it crushed him badly, and escaping steam scalded him. He is much to be pitied, being a cripple for life, but not through any fault of the defendant company.

The negligence which he attributes to the defendant company is in not having given him warning, by ringing the bell or other-

wise, that the engine was about to move, and in not having kept a better watch ahead, so as to have discovered his predicament sooner and stopped the locomotive in time to avoid injuring him, as would have been possible, since he remained unhurt between the rails while the locomotive moved 36 feet, whereas it could have been stopped within 2 feet, at the slow rate it was going.

The fact of the matter is that the plaintiff had been in the employ of the defendant company and at this work only one week; that no one knew of this alleged habit of his to ride in the cab; that the very great probability is that he got upon this footboard to ride home, which was but a short distance, and probably did so merely because the road was muddy and sloppy; that he knew perfectly well that this locomotive was about to start; that standing as he was, with his back to the tender and facing the switchman, who was walking ahead to open the switch and give the signal for starting, he had as good an opportunity as any one to see the signal of the switchman and know when the engine would start; that the bell was tapped, though, possibly, at the very moment of starting; that the engineer saw plaintiff on the footboard, and had, and could have had, no reason to suppose that he was there for any other purpose than to ride, or that he would be in any danger whatever from the starting of the locomotive; that the locomotive started slowly, "eased off," as one of the witnesses says; and that it was stopped immediately upon the cries of plaintiff being heard. The reason why the engineer did not see plaintiff fall off was because he had turned his attention momentarily in another direction. There was no defect in the engine, and no neglect in its operation. To persons immediately after the accident, and to the physicians in the hospitals, plaintiff stated that he did not know how he came to fall.

The judgment appealed from, rejecting plaintiff's demand, is affirmed, at his cost.

(78 South. 558)

No. 21192.

IBERVILLE WHOLESALE GROCERY CO.,  
Limited, v. PEOPLE'S BANK et al.

(April 1, 1918. On Application for Rehearing,  
April 29, 1918.)

(Syllabus by the Court.)

1. CONTRACTS  $\Leftrightarrow$  350(1)—RECOVERY—SUFFICIENCY OF EVIDENCE.

This case presents only questions of fact.

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR  $\Leftrightarrow$  204(1)—ADMISSION OF EVIDENCE—OBJECTION.

Where evidence was offered and admitted without objection by defendant, it was too late to urge the objection on appeal.

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Joseph E. Le Blanc, Jr., Judge.

Action by the Iberville Wholesale Grocery Company, Limited, against the People's Bank and the L. Danos Planting & Manufacturing Company. Judgment for plaintiff, and the People's Bank appeals. Affirmed.

Pugh & Lemann, of Donaldsonville, and J. H. Pugh, of Plaquemine, for appellant. Borron & Wilbert, of Plaquemine, for appellee.

SOMMERVILLE, J. Plaintiff and defendants entered into an oral agreement stipulating that plaintiff and the defendant bank would advance to the L. Danos Planting & Manufacturing Company supplies and money for pay rolls for cultivating, harvesting, and manufacturing the crop of sugar and corn on the Milly plantation during the year 1913.

Plaintiff was to advance \$5,000 worth of supplies; and the bank was to furnish the money necessary for the pay rolls.

The Danos Company pledged its crop in favor of the president of the bank for \$35,000, issuing its notes under said pledge, one of which notes for \$5,000 was to be given, and was given, by the bank to the plaintiff as collateral security. The other notes were held by the bank.

Plaintiff rendered monthly statements to the bank showing advances made by it to the Danos Company for supplies.

In the month of October the plaintiff had furnished \$5,000 worth of supplies; and it was further agreed between the parties that the plaintiff should continue furnishing supplies to harvest the balance of the crop, under the terms of the original agreement.

In that agreement it was stipulated that the bank should handle the crop of the Milly plantation, and that it would prorate the proceeds thereof between itself and plaintiff. The bank has been paid, or has paid itself, the amount advanced by it for pay rolls; and it has also discharged further indebtednesses due by the Danos Company to it out of the said proceeds. The value of the supplies furnished by plaintiff have not all been paid; and this is a suit against the bank and the Danos Company for the balance, \$2,180.86, evidenced by notes issued monthly by the Danos Company in favor of plaintiff.

The Danos Company admitted the amount claimed to be due. The bank admitted that there was an agreement between the parties, but denied certain provisions alleged by plaintiff to have been made therein. It denied that there was any balance on said crop, or that there was any amount due plaintiff under said agreement, or that plaintiff was to furnish supplies in excess of \$5,000.

There was judgment in favor of plaintiff as prayed for; and the bank has appealed. The Danos Company has not appealed.

[1] It is stated on behalf of the defendant bank on its brief filed in this court that the only matters in dispute are as to a balance due by the Danos Company to plaintiff for supplies furnished in 1912, and as to the advances made by plaintiff for the year 1913 in excess of \$5,000. It is stated:

"The record shows that there is no question about the advances up to \$5,000 for which the plaintiff secured a crop lien note, which note was in due course paid."

The evidence shows that the 1912 indebtedness was paid to plaintiff in part out of the proceeds of the crop of 1913, and that it was agreed between the parties it should be paid if there was an excess in the receipts of the crop of 1913 over and above the cost of making the same. There was such an excess; and that question passes out of the case.

As to the excess over and above \$5,000 claimed by plaintiff for supplies for the year 1913, the evidence is that such excess was protected by an agreement entered into between all parties, and that monthly statements thereof were furnished by the plaintiff to the bank. The record shows there would have been ample in the hands of the defendants to pay this excess if the bank had not paid itself, or caused itself to be paid, out of the said funds, the sum of \$2,211.71, being interest due on certain mortgage notes held by it and bearing upon the Milly plantation, and the further sum of \$1,249.52, due by the Danos Planting Company to Jas. E. and G. T. Dunlap, the former being the president of the defendant bank, for insurance on a certain policy issued by said agents. These were clearly not amounts due for pay rolls, or for the necessary running expenses of the Milly plantation. And they should not have been paid out of the proceeds of the crop of 1913 by preference to the claim of plaintiff for supplies furnished for the making and harvesting of that crop.

[2] Appellant urges in this court that parol evidence is not admissible to prove the debt owed by a third person, citing the article of the Code to that effect. But this point was not raised in the trial court and disposed of there. Oral evidence was therein offered and admitted without objection on the part of the defendant bank, and it is now too late to urge it here, even if the agreement under discussion was one to pay

the debt of a third person. But the agreement was not to pay the debt of a third person. It was one entered into by three parties, wherein one of the parties was to hold the money of the Danos Company in its hands for the purpose of distributing it ratably between plaintiff and the bank.

The judgment appealed from is affirmed.

PROVOSTY, J., recused.

On Application for Rehearing.

PER CURIAM. There was an error in allowing interest on \$830.84 from January 15, 1914, in the judgment appealed from. Eight per cent. interest should have been allowed only on \$376.31, and the judgment appealed from should have been amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by allowing 8 per cent. interest on \$376.31, instead of \$830.84, from January 15, 1914, and, as thus amended, it is affirmed.

The application for rehearing is refused; costs of appeal to be paid by appellee.

(78 South. 559)

No. 21346.

LOWE v. KANSAS CITY SOUTHERN RY. CO.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by Editorial Staff.)

1. RAILROADS ~~278~~(1)—INJURY ON TRACK—CONTRIBUTORY NEGLIGENCE.

Plaintiff, who boarded defendant's standing train to talk with a passenger, and, after alighting, started across a main track toward the station, knowing that an incoming train was due, and who had been warned of danger by the station agent and by the whistle of the incoming train, and who might have stood in safety between the two trains had he stopped, looked, and listened, was guilty of contributory neg-

ligence defeating his recovery for injury when struck by incoming train.

2. RAILROADS ~~278~~(6)—PERSONAL INJURY—LAST CLEAR CHANCE.

In such case, where it was impossible for the engineer of the train which struck plaintiff to have seen the danger in time to have avoided the accident, the doctrine of last clear chance had no application.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Thomas Lowe against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Judgment reversed, and plaintiff's demand refused.

Alexander & Wilkinson, of Shreveport, for appellant. Foster, Looney & Wilkinson, of Shreveport, for appellee.

LECHE, J. Defendant appeals from a judgment, based on a verdict for \$5,500, rendered against it in an action in damages for personal injuries.

[1] Plaintiff was seriously injured and maimed by one of defendant's trains at Blanchard Station, in the parish of Caddo, about 9:30 o'clock in the forenoon of June 17, 1913, under the following circumstances: Plaintiff had gone to the railroad station to use the telephone, and there he found out that he could get the information which he wanted, from some of the passengers on a south-bound local train which was then due. The expected train arrived on time, and pursuant to a regulation of the defendant company, well known to plaintiff, entered into a siding or passing switch, and stopped opposite the station, where it had to wait in order to meet a north-bound train coming in on the main track located between the siding and the station. In pursuance of the object of his visit to the station, plaintiff, in order to speak to a Mr. Ellett, who was a passenger on the south-bound train, walked

over and across the main track, and mounted the step of the coach while Mr. Ellett stood on the platform. While he was thus engaged in conversation, the north-bound train was approaching the station and the south-bound train began moving southward. Plaintiff got off the step where he had been talking and started back across the main track towards the station platform just in time to be struck by the incoming train. Plaintiff knew that the two trains met at this place, he was warned of danger by the station agent and by several short blows of the whistle of the north-bound train, but we judge from his testimony that he did not hear the warnings at all, or, if he heard them, he did not do so in time to save himself. His mind was evidently absorbed with the matters which he had discussed with Mr. Ellett, and he became oblivious of his surroundings.

[2] The railroad track curves outward from the station at Blanchard, and a person near a standing train, on the outer or passing track, can only see southward to a distance, estimated by defendant's conductor, of 250 to 300 feet. The whole situation, however, and its danger was well known to plaintiff. He might have stood in safety, between the two trains had he stopped, looked, and listened, but he failed to exercise the ordinary care which the time, place, and circumstances plainly required of him. Although the defendant might also have been negligent, the only theory upon which plaintiff could recover would be under the last clear chance doctrine. But the record shows that it was impossible for the engineer to have seen the danger in time to avoid the accident, and therefore that doctrine has no application to the facts of this case.

The judgment appealed from is avoided and reversed, and plaintiff's demand refused at his cost.

(78 South. 560)

No. 20885.

**PURE OIL OPERATING CO. v. GULF REFINING CO. OF LOUISIANA et al.**

(April 1, 1918. Rchearing Denied April 29, 1918.)

(*Syllabus by Editorial Staff.*)

**1. INJUNCTION ⇨136(2) — PRELIMINARY — MAINTENANCE IN POSSESSION—OUSTER.**

Though a preliminary injunction may issue to maintain a plaintiff in possession, it should not be allowed to oust one in possession of property.

**2. EVIDENCE ⇨71—PRESUMPTION—COURSE OF MAILS.**

There is a legal presumption that a letter properly addressed, stamped, and mailed reached its destination in due time.

**3. MINES AND MINERALS ⇨75—LEASE—RENEWAL.**

In suit by one oil company against another to enjoin interference with leased lands, the burden of proof was on plaintiff to establish that it had made a timely deposit in bank to renew its lease of the lands for another year.

**4. MINES AND MINERALS ⇨75 — RENEWAL OF OIL LEASE—SUFFICIENCY OF EVIDENCE.**

In suit by an oil company to enjoin another company from interfering with its possession of leased land, evidence held insufficient to show that plaintiff made a timely deposit in bank to renew its lease for another year.

**5. LANDLORD AND TENANT ⇨184(2) — RENEWAL OF LEASE—REFUSAL OF DEPOSITS—DUTY OF LESSORS.**

Where an oil company had the right to renew its lease for another year by making a deposit in bank, and it made deposits which the lessors refused to accept, the first as insufficient, the second as made too late, the lessors were under no obligation to do more than inform the bank of their unwillingness to accept, not to return or offer to return the deposits.

Appeal from Twelfth Judicial District Court, Parish of De Soto; John H. Boone, Judge.

Suit by the Pure Oil Operating Company against the Gulf Refining Company of Louisiana and others. From judgment for plaintiff perpetuating injunction, defendants appeal. Judgment set aside, injunction dissolved, and suit dismissed.



D. Edward Greer, of Houston, Tex., Thigpen & Herold, of Shreveport, and Elam & Lee, of Mansfield, for appellants. John W. Dunkle, of Pittsburgh, Pa., and Liverman & Pollock, of Mansfield, for appellee.

PROVOSTY, J. The plaintiff company alleges that it holds a mineral lease upon certain lands, fully described, with right of ingress and egress for exploitation for oil and gas; that after its lessors had made said lease they made a similar lease to the defendant company; that this company "is trying to interfere with the peaceful possession of your petitioner of the land leased," to which and on which said company has no rights; that said conduct of said company "has worked and will continue to work an irreparable injury to your petitioner"; and that an injunction "is necessary to protect petitioner's interest in said matter." And the plaintiff prays for an injunction accordingly.

The injunction having issued, the defendant moved its dissolution with damages, on the grounds that the plaintiff had never been and was not at the time of filing suit in possession, and that plaintiff's lease had terminated at the time the second lease was entered into.

[1] As a matter of fact, plaintiff had never entered upon said land, or in any other way exercised its rights under the lease, but had simply held the contract of lease; whereas defendant, on the contrary, immediately after entering into its lease, had taken actual possession, by fencing the land and by placing guards to oppose invasion of it; and at the filing of the suit had been thus in actual possession for more than seven months.

"It has been repeatedly held that, although a preliminary injunction may issue to maintain a plaintiff in possession, it should not be allowed to oust one in possession of property." *State ex rel. Raymond v. Judge*, 41 La. Ann. 951, 6 South. 721, and cases there cited, particularly *N. O. & N. E. R. R. Co. v. Miss., T. B. & Lake Co.*, 36 La. Ann. 561. .

The injunction must therefore be dissolved, with the \$750 damages which the services of the attorneys for obtaining the dissolution of it are admitted to be worth.

The question of the alleged termination of the lease of plaintiff having been put at issue, both in the motion to dissolve and in the answer subsequently filed, and having been fully tried, and having been passed on by the lower court, we have concluded that it should be decided by this court.

The lease expired on March 29, 1913, unless, on or before that date, the plaintiff renewed it for another year by paying 10 cents per acre. "Such payment for such renewal may be made direct to the party of the first part or deposited to their credit in the People's Bank at Mansfield, La."

Six of the \$8 required for said renewal were deposited in time. The lessors refused to accept same, on the ground that the deposit ought to be of \$8. The plaintiff, on being notified to that effect, sent a check for the additional \$2. The question is as to whether this second deposit was made in time; that is, on the 29th of March.

[2] On the side of plaintiff there is the testimony of plaintiff's secretary-treasurer, that the check was duly mailed in Pittsburgh, Pa., on March 26, 1913; and there is the undisputed fact that, if so mailed, it should have reached the Mansfield bank three days thereafter, or on March 29th; and there is the legal presumption that a letter properly addressed, stamped, and mailed reaches its destination in due time.

On the side of defendant there is the deposit slip bearing date the 1st of April; and there is the testimony of the cashier of the bank that by the invariable custom of the bank the check, if received on the 29th, would have been credited as of that date if received before closing time, and the next day, if received after closing time, unless the next day was a Sunday or other legal holiday, in

which case the credit would have been entered on the first business day after reception. And there is the testimony of Dr. Nabors, one of the lessors, representing both himself and his sister-in-law, the other lessor, in the matter, to the effect that the deposit was made on the 1st of April, and that he, for himself and his sister-in-law, refused to accept it, as coming too late.

[3, 4] This evidence leaves doubtful at best whether the deposit was made timely, i. e., on the 29th of March; and the burden of proof was on plaintiff to establish that it had been so made. Hence the fact of the deposit having been timely made must be considered as not proved.

[5] The learned counsel of plaintiff say that these lessors never returned or offered to return these deposits; nor some royalties which, subsequently to the filing of the present suit, were, in like manner, deposited to their credit in said bank; but we do not see that these lessors were under obligation to do more than they did, namely, inform the bank of their unwillingness to accept the deposits.

The judgment appealed from, which perpetuated the injunction, is therefore set aside, and the injunction is dissolved, and the suit dismissed, and the plaintiff company is condemned to pay to the defendant company \$750 damages as attorney's fees, and to pay the costs of this suit.

(78 South. 581)

No. 21244.

WILSON et al. v. PIERSON.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER §140—SLANDER OF TITLE—PLEADING.

The defendant, in an action for slander of title, who does not deny that the plaintiff is in possession of the property, or plead that the plaintiff has therefore no right of action, must

either admit or deny the alleged slander—that is, either admit or deny that he disputes the plaintiff's title—and, if he claims a real right in the property, he presents for decision the question of validity of his claim.

2. LIBEL AND SLANDER §140—SLANDER OF TITLE—ANSWER—DENIAL.

A denial, in the answer of the defendant in an action for slander of title, that the plaintiff is in possession as owner of the property, is not a denial that the plaintiff is in possession.

3. ESTOPPEL §26—BY DEED.

The defendant sold to the plaintiff a tract of land of which he had no title, declaring that he reserved the mineral rights. The plaintiff, being informed thereafter that he had no title, bought the property from the party who owned it, and sued the defendant for claiming the mineral rights. The latter pleaded that the plaintiff was estopped, by the declaration in the first deed that the vendor reserved the mineral rights, from disputing the latter's title to the mineral rights. *Held*, that the plea of estoppel was not well founded, because the plaintiff had not conveyed, or pretended to convey, the mineral rights to the defendant, had not received any consideration for the supposed reservation of the mineral rights, and was therefore not under obligation to defend the defendant's claim to the mineral rights.

Appeal from Twelfth Judicial District Court, Parish of De Soto; John H. Boone, Judge.

Action of jactitation or for slander of title by J. C. Wilson and J. T. Henderson against J. T. Pierson. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. F. Pierson, of New Orleans, for appellant. Thigpen & Herold, of Shreveport, for appellees.

O'NEILL, J. The defendant bought the property involved in this suit from one who had no title, and sold the land to J. T. Henderson, reserving the minerals or mineral rights. Henderson, being advised thereafter that he had no title, bought the land from the owner in possession, and sold the mineral rights to J. C. Wilson. He and Henderson, claiming to have acquired possession from their vendor, brought this action of jactitation or for slander of title.

The defendant did not except to the plain-

tiffs' right of action for slander of title, or plead that they were not in possession of the property. He denied that they were in possession as owners, or that they were either the sole owners or the possessors in common. He asserted title to the minerals or mineral rights in the land, and pleaded that Henderson was estopped from disputing his (defendant's) title or possession of the minerals or mineral rights, by the act of sale in which it was acknowledged that he (defendant) reserved to himself the minerals or mineral rights in the land that he sold to Henderson. And he pleaded that Wilson, claiming title to the minerals or mineral rights by purchase from Henderson, was also bound and estopped by the latter's acknowledgment that he (defendant) had retained the minerals or mineral rights.

The defendant's answer, therefore, put at issue the question whether he or the plaintiff Wilson owned the minerals or mineral rights in the land. There is no serious dispute that the plaintiff Henderson owns the land itself. Judgment was rendered in favor of the plaintiffs, recognizing Henderson's title to the land and Wilson's title to the mineral rights. The defendant prosecutes this appeal.

#### Opinion.

[1] Not having excepted or pleaded to the plaintiffs' right of action for slander of title, or denied their possession of the property, the defendant was required either to admit or to deny the alleged slander; that is, either admit or deny that he claimed title. By claiming title to a real right in the property and pleading that the plaintiffs were estopped from disputing his title, he presented to the court for decision the question of validity of his title. See *Teddle v. Riser*, 121 La. 672, 46 South. 688; *Garrett v. Spratt*, 131 La. 710, 60 South. 199; *Perry v. Board of Commissioners*, 132 La. 416, 61 South.

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511; *Slattery v. Arkansas Natural Gas Co.*, 138 La. 793, 70 South. 806.

[2, 3] It is of no importance whether the defendant in this jactitation suit is to be regarded as plaintiff in a petitory action, because his defense depends solely upon his plea of estoppel.

The plea is founded upon the doctrine that a claimant cannot dispute the title by which he claims. But that elementary principle is not applicable to this case, because the plaintiffs are not claiming under or by virtue of the title, or supposed title, acquired by the defendant and conveyed by him to Henderson. They have repudiated that title as a nullity resulting from the sale of property by one who did not own it. R. C. C. 2452. Surely Henderson's error in purchasing from the defendant, who had no title, did not estop Henderson from buying the property from the owner. *Leonard v. Garrett*, 128 La. 541, 54 South. 984. It is equally plain that Henderson's purchase from the owner of the property did not inure to the benefit of the defendant as a result of his having reserved, or declared he reserved, the mineral rights from the sale he made to Henderson. If Henderson had sold or granted the mineral rights to the defendant, a personal obligation would have been incurred by Henderson to defend his vendee's title, and the subsequent purchase of the property by Henderson would have inured to the benefit of his vendee. But what was attempted by the defendant in reserving to himself the mineral rights in the land he sold to Henderson—and what would have been accomplished if the defendant had acquired a valid title—was to create a real obligation, affecting only the property, not the person. See R. C. C. 2012.

Our opinion is that the plea of estoppel invoked by the defendant is not well founded.

The judgment is affirmed, at the cost of the appellant.

(78 South. 562)

No. 21062.

NICHOLS v. BRYAN et al.

Opposition of BRITTON &amp; KOONTZ BANK.

(Nov. 26, 1917. On Rehearing, April 29, 1918.)

*(Syllabus by Editorial Staff.)*1. JUDICIAL SALES  $\S$ 25—SALE FOR CASH—REFUSAL TO COMPLY WITH BID.

When a judicial sale is for cash, and the adjudicatee refuses to comply with his bid, there is no sale, except where the refusal is well grounded.

2. JUDICIAL SALES  $\S$ 23—MORTGAGE—RETENTION OF PRICE BY PURCHASER—STATUTE.

By direct provision of Code Proc. art. 710, if on property judicially sold a general mortgage exists, resulting either from a legal or judicial mortgage, the purchaser cannot avail himself of such mortgage to retain part of the price.

On Rehearing.

3. JUDICIAL SALES  $\S$ 22—COHEIR AS PURCHASER—PAYMENT—STATUTE.

By express provision of Civ. Code, art. 1343, any coheir who is of age can become a purchaser at the sale of the hereditary effects to the amount owing him from the succession without paying the surplus over the portion coming to him until it has been definitely fixed by a partition.

Provosty, J., dissenting.

Appeal from Eighth Judicial District Court, Parish of Catahoula; Riley J. Wilson, Judge.

Suit for partition by H. S. Nichols against Mrs. E. S. Bryan and others, wherein the Britton & Koontz Bank filed opposition. From the judgment, there is an appeal. Judgment amended by decreeing the adjudication of the property in question heretofore made in the partition proceedings to be null and void, and by dismissing as in case of nonsuit the opposition of the Britton & Koontz Bank, etc., and judgment as amended affirmed.

M. C. & W. H. Thompson, of Winnsboro, for appellant. S. D. Pearce, of Ruston, for appellees.

PROVOSTY, J. Mrs. Bryan and her emancipated son and two minor daughters being

owners in indivision of a plantation, one half to her and one half to them, the son brought suit against his said co-owners for a partition by licitation. There was judgment ordering the property to be sold for cash, and at the sale the son and two minors became the adjudicatees. Before the sale, the Britton & Koontz Bank filed a third opposition in the partition suit, claiming to have a mortgage upon Mrs. Bryan's share of the property, which entitled it to take the proceeds of the sale of this share except in so far as Mrs. Bryan might be indebted to her said children as their tutrix. The bank prayed that the amount of the said indebtedness be ascertained and fixed, and that an order issue to the sheriff to hold in his hands the proceeds of the sale of the said share of Mrs. Bryan until the further orders of the court. This order having issued, the sheriff refused to make title to the said adjudicatees unless they should pay the price of the said share of their mother into his hands. This they refused to do, claiming that, by virtue of their minor's mortgage upon the property of their mother and tutrix, they were entitled to retain these proceeds in their hands. The sheriff, after waiting 15 days, returned the writ unsatisfied, reciting in his return upon it the refusal of the said adjudicatees to comply with their bid. The bank then filed a supplemental petition asking that the adjudication be decreed to have been without effect, and Mrs. Bryan's half of the property to have continued to belong to her, and that the amount of her indebtedness to her children be fixed. By an account theretofore rendered and accepted as correct, the amount of this indebtedness had been fixed as between the son and the mother, but the bank, in its said supplemental petition, attacked this account and settlement as incorrect and collusive, contesting various items in it.

There is no dispute either as to the ex-

istence of the mortgage of the bank upon Mrs. Bryan's share of the property, nor as to its amount. The sole issues are as to what is the amount of the indebtedness of Mrs. Bryan to her children, and as to whether the said adjudication must not be considered as having produced no effects, and, in consequence, the share of Mrs. Bryan in the plantation to have continued to belong to her.

Mrs. Bryan and her children being fully agreed as to the amount of her indebtedness to them, the first of these issues lies exclusively between the bank and the children. And the bank can have an interest in the amount of Mrs. Bryan's debt to her children only in the event the property upon which it and the children are asserting mortgage claims proves insufficient to satisfy both claims when sold. Prior to a sale, therefore, the bank has no interest, and therefore no standing, to litigate that issue.

[1,2] Has there been a sale? We think not. When a judicial sale is for cash, and the adjudicatee refuses to comply with his bid, there is no sale. *Haynes v. Breaux*, 16 La. Ann. 143; *Rowly v. Kemp*, 2 La. Ann. 361; *Hills v. Jacobs*, 7 Rob. 406; *Losee v. Stauton*, 24 La. Ann. 370. The situation is of course, different where the refusal is well grounded. But in the present case it was not well grounded. The children had only a legal, or general, mortgage, and the C. P. is explicit (article 710), that:

"If there exist a general mortgage on the property resulting either from a legal or judicial mortgage, the purchaser cannot avail himself of this mortgage \* \* \* to retain part of the price."

No one can say that at the next offering of this property for sale it may not bring enough to satisfy all claims upon it, and, indeed, in view of the late marked increase in the value of agricultural lands, such a result may not be improbable.

The learned counsel for appellees cites

*Childs v. Lockett*, 107 La. 270, 31 South. 751, as authority for the proposition that the failure of the adjudicatee to pay the price at a cash judicial sale does not nullify the sale. But in that case the price had been paid.

The same learned counsel says that an heir purchasing the hereditary property is not obliged to pay the surplus over the portion coming to him until the surplus is definitely fixed by partition. But Mrs. Bryan's share of this plantation is not "hereditary property." Mrs. Bryan is still living.

The judgment appealed from is therefore set aside; the adjudication of the property in question heretofore made in the partition proceedings herein is decreed to be null and void; the third opposition of Britton & Koontz Bank is dismissed as of nonsuit at the cost of said bank; and the costs of this appeal are ordered to be paid by the appellees Henry S. Nichols, Eliza Baker Nichols, and Mary Reynolds Nichols.

#### On Rehearing.

LECHE, J. [3] A rehearing was granted in this case, mainly for the reason that we entertained some doubt as to the correctness of our ruling to the effect that the purchasers of the property sought to be partitioned in this suit could not avail themselves of the benefit of article 1343 of the Civil Code.

That article reads as follows:

"Any coheir of age, at the sale of the hereditary effects, can become a purchaser to the amount \* \* \* owing to him from the succession, and he is not obliged to pay the surplus \* \* \* over the portion coming to him, until this portion has been definitely fixed by a partition."

Whether the property involved in this proceeding is hereditary, and, if not hereditary, whether the rule announced in the quoted article nevertheless applies, as seems to be indicated by the provisions of article 1290, C. C., need not be decided in this case,

for the reason that the benefit of said article 1343, by its very terms, only applies to coheirs of age, and not to minor coheirs in whose favor it is attempted to be applied in the present case. For this reason, the conclusion reached by us in our former decree as to this issue should be sustained.

Opponent in its application for rehearing complains also that we have apparently reversed the judgment appealed from in so far as it recognized opponent's mortgage indebtedness against Mrs. E. S. Bryan. It was not our intention to do so, for that question is not presented in this appeal; but to remove all doubt we accordingly recast the judgment, as follows:

It is therefore ordered that the judgment appealed from be amended by decreeing the adjudication of the property in question heretofore made in the partition proceedings herein to be null and void, and that it be further amended by dismissing as in case of nonsuit the opposition of Britton & Koontz Bank in so far only as it seeks to reduce the indebtedness of Mrs. E. S. Bryan, tutrix, in favor of her minor children and of the plaintiff herein, and that said judgment, as thus amended, be affirmed at the costs of plaintiff and defendants, appellees.

See dissenting opinion of PROVOSTY, J., 78 South. 564.

(78 South. 564)

No. 22986.

VILLAGE OF CEDAR GROVE v. BARTMESS.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by the Court.)

1. HIGHWAYS ~~§~~151(1) — WORKING OUT STREET TAX—VALIDITY OF ORDINANCE.

A municipal ordinance, requiring every able-bodied male citizen of a prescribed age to pay a stipulated tax or work on the streets a stated number of days in each year, is not invalid

merely because it reverses the order of the alternative requirements, as suggested in the statute (Act No. 17 of 1910) authorizing the municipality to compel the citizens to work on the streets or pay the tax.

2. COSTS ~~§~~286—MAYOR'S COURT—JURISDICTION—PAYMENT OF COSTS OF PROSECUTION.

The mayor of a village, ex officio judge of the mayor's court, has authority to condemn a person, convicted of violation of a municipal ordinance, to pay the costs of the prosecution, in addition to the fine imposed.

Appeal from Mayor's Court, Village of Cedar Grove; W. E. Payne, Mayor.

U. S. Bartmess was convicted of the violation of an ordinance requiring payment of street tax or work on street, and condemned to pay the costs of the prosecution or to be imprisoned. Motion to quash affidavit overruled, and he appeals. Judgment and sentence affirmed.

Hugh C. Fisher, of Shreveport, for appellant. William C. Barnette, of Shreveport, for appellee.

O'NIELL, J. The defendant, appellant, was prosecuted for violation of a municipal ordinance requiring every able-bodied male inhabitant of the village, between the ages of 18 and 55 years, to pay a street tax of \$3 per annum or work 6 days on the streets. He filed a motion to quash the affidavit, on the ground that the ordinance was ultra vires and illegal, because as he alleged, it purported to levy a street tax, whereas the legislative authority invoked—i. e., Act No. 17 of 1910—merely authorized the municipality to compel the inhabitants to work on the streets of the village. The motion was overruled, a bill of exceptions was reserved, and the defendant was tried and convicted, and sentenced to pay a fine of \$10 and costs of the prosecution or be imprisoned 5 days in the village lockup. He complains, not only of the overruling of his motion to quash the affidavit, but also of being condemned to pay the costs of the prosecution.

Opinton.

[1] Act No. 17 of 1910 authorizes all incorporated towns and villages to require every able-bodied male inhabitant, between the ages of 18 and 55 years, to work on the streets, not exceeding 8 days in each year, on the summons of the street commissioner and under his supervision. The statute provides, however, that any person may be relieved of the duty of working on the streets, by paying a street tax, the amount of which shall be fixed in the municipal ordinance requiring the street duty, and shall not exceed \$4 per annum. The statute further empowers the municipal authorities to provide for the punishment, by fine or imprisonment, or both, of any person who shall fail or refuse either to perform such street duty or to pay the tax.

The complaint of the appellant is that, instead of requiring, primarily, that the citizen shall work on the streets, and permitting him to be relieved of the street work by paying the tax, the ordinance requires, primarily, that the citizen shall pay the tax, and permits him to be relieved of the tax by working on the streets.

All that the statute requires, and all that concerns the citizen, in that respect, is that he shall have the option either to work on the streets or pay the tax. Whether the ordinance says that the citizen shall either work on the streets or pay the tax, or says that he shall either pay the tax or work on the streets, is only an example of the difference 'twixt tweedledum and tweedledee.

It is a matter of no importance that the ordinance complained of does not provide that the street work shall be done upon the summons and under the supervision of the street commissioner. The statute does not prescribe a form for the ordinance that the municipalities are authorized to enact. The ordinance in question conforms with all substantial requirements of the statute.

[2] The defendant's contention that the mayor of the village, ex officio judge of the mayor's court, had no authority to condemn him to pay the costs of the prosecution, is not well founded. A party convicted in a criminal prosecution must pay the costs incurred, if legal process can be made effective. See *Parish Board of Directors v. Hebert, Sheriff*, 112 La. 467, 36 South. 497, and the decisions there cited.

The judgment and sentence appealed from are affirmed.

(78 South. 565)

No. 22265.

Succession of MINGO.

DELPIT et al. v. CANAL BANK & TRUST CO. (MINGO, Intervener).

(Nov. 26, 1917. On Rehearing, April 29, 1913.)

(*Syllabus by the Court.*)

1. SLAVES  $\S$  25 — MARRIAGE — LEGITIMIZING ISSUE.

The Emancipation Proclamation, issued in January, 1863, and the state Constitution of 1864, though they abolished and prohibited slavery, did not affect the law of this state prohibiting marriages between free white persons and free people of color; and an attempted acknowledgment and legitimation by contract of marriage in 1865 between a white man and a colored woman of children who had been conceived and born when such marriages had been, as they still were, prohibited, on pain of nullity, produced no legal effect.

2. SLAVES  $\S$  25 — MARRIAGE CONTRACT — LEGITIMATION—IDENTITY.

The statement, in a contract of marriage, "Furthermore, the children of both sexes, born to these two parties before their legitimate union, are, by this act, legitimized," is insufficient to identify the children referred to, either as to parentage, number, or name.

On Rehearing.

(*Additional Syllabus by Editorial Staff.*)

3. COURTS  $\S$  224(2) — LOUISIANA SUPREME COURT—APPELLATE JURISDICTION.

Where the brothers and sisters of a decedent were by an ex parte judgment recognized to be heirs and sent into possession, and ruled a bank and trust company to show cause why it should not pay over a deposit left by decedent amounting to \$736.50, and the bank deposited

such amount in court, and the decedent's surviving husband intervened, and for the first time tendered the issue of the heirs' legitimacy, of which question the Supreme Court alone has jurisdiction, the judgment in favor of intervenor was appealable under Const. art. 95, declaring that an appeal from a judgment rendered on an incidental demand shall go to the court having jurisdiction of the main demand.

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; W. S. Rownd, Judge.

Ernest Delpit and others caused the succession of Victoria White Mingo to be opened, and obtained a judgment that they be put in possession as the heirs at law, and ruled the German American Branch of the Canal Louisiana Bank & Trust Company to show cause why it should not pay over an amount on deposit, and decedent's surviving husband, Smiley Mingo, intervened. Judgment for intervenor, and the heirs appeal. Affirmed.

L. C. Moise, of Covington, for appellants. R. C. & S. Reid, of Amite, for appellee Smiley Mingo. R. C. & S. Reid, of Amite, and Dart, Kernan & Dart, of New Orleans, for appellee Canal Bank & Trust Co.

#### Statement of the Case.

MONROE, C. J. Victoria White Mingo, wife of Smiley Mingo, died, without issue, in the parish of Tangipahoa, in July, 1915, leaving certain sums of money, approximating \$800, on deposit in two of the banks of New Orleans, and shortly thereafter Ernest Delpit and others (whom we shall call plaintiffs), appearing as her brothers and sisters, caused her succession to be opened and obtained a judgment ordering that they be put in possession, as her heirs at law, of such property and money as she had acquired prior to the month of November, 1909, and particularly of the money in the banks, alleging that the same was her separate property.

They then ruled the German American Branch of the Canal Louisiana Bank & Trust

Company, in which there appears to be a deposit amounting to \$736.50, requiring it to show cause on December 13th following why it should not pay over said deposit, to which the bank answered that it could not safely make the payment; that decedent was a married woman, and had left both separate and community property; that she had drawn out more money after 1909 than she then had on deposit; and that respondent was unable to ascertain what proportion of the amount on deposit at the time of her death belonged to her heirs, and what proportion to the pre-existing community; and respondent prayed to be dismissed with costs, or permitted to deposit the amount in its hands in the registry of the court, and that plaintiffs in rule and the surviving husband be cited to appear and litigate their respective claims. Thereupon the surviving husband intervened, alleging that Victoria Doucet, the mother of the decedent, was a slave at the time of the birth of her children, and the alleged father, Luke Delpit, a white man, and that no marriage could have taken place between them. Wherefore he prayed that the judgment sending plaintiffs into possession be annulled, and that he be recognized as the sole heir of his wife. Plaintiffs answered the intervention, the case was tried, mainly upon an agreed statement of facts, and there was judgment in favor of the intervenor, from which plaintiffs prosecute this appeal.

It is admitted that Victoria Doucet was a slave of the African race "until emancipated by the Constitution and laws of the United States and of the state of Louisiana"; that she belonged to Luke Delpit, who was a white man, native of Italy, and naturalized citizen of the United States; that, after he became her owner, she bore the children whose names are given by plaintiffs in their original petition herein filed; and that she died in 1899, Delpit having died in 1867.



It is further admitted that "one of the daughters of Victoria Doucet" married — White, and, after his death, married Smiley Mingo, and that, departing this life on July 30, 1915, she left no issue of either marriage. There is filed in evidence a certificate showing that Smiley Mingo and Victoria White were married on November 30, 1909, and there are two copies of recorded instruments, from which it appears that Luke Delpit and "Catherine Doucet" were married in New Orleans, with the blessing of the Catholic Church, on December 13, 1865—one of said instruments containing the following paragraph, to wit:

"Further, the children of both sexes born to these two parties before their legitimate union are, by this act, legitimized."

Farther than the admission "that, after the purchase of said slave, Victoria Doucet, by Luke Delpit, she bore the children whose names are given in the petition filed in this suit on October 30, 1915," there is nothing in the record, in the way of evidence, which tends to identify plaintiffs as the children referred to in the paragraph thus quoted, or to identify the Victoria Doucet mentioned in plaintiff's petition and in the statement of facts with the Catherine Doucet, named in the marriage certificates, as the person who became the wife of Luke Delpit. It seems, however, to be conceded in the briefs that the two names describe the same person.

#### Opinion.

In December, 1865, when Luke Delpit and Catherine Doucet assumed to intermarry and to legitimate an unstated number of unnamed children, born to them "before their legitimate union," the Civil Code of Louisiana contained provisions declaring (article 95) that free persons and slaves were incapable of intermarriage, that the celebration of such marriages was prohibited and the marriages void, and that "there is the same incapacity

and the same nullity with respect to marriages contracted by free white persons with free people of color"; further declaring (article 217) that children born out of marriage, "except those who are born from incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother whenever the latter have legally acknowledged them for their children, either before their marriage or by their contract of marriage itself"; that (article 221) "the acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, whenever it shall not have been made in the registering of the birth or baptism of such child." No other proof of acknowledgment shall be admitted in favor of children of color; that (article 222) "such acknowledgment shall not be made in favor of the children produced by an incestuous or adulterous connection"; that (article 226) "illegitimate children who have not been legally acknowledged may be allowed to prove their paternal descent, provided they be free and white. Free illegitimate children of color may also be allowed to prove their descent from a father of color only"; that (article 230) "illegitimate children of every description may make proof of their maternal descent, provided the mother be not a married woman"; that (article 912) "natural children are called to the legal succession of their natural mother when they have been duly acknowledged by her, if she has left no lawful children or descendants, to the exclusion of her father and mother, \* \* \* or collaterals of lawful kindred"; that (article 918) the wife, not separated from bed and board, inherits from the husband to the exclusion of natural children, but, where the husband survives, the natural child of the wife is preferred (but not the natural brothers and sisters).

[1] It is here argued on behalf of plain-

tiffs that the Emancipation Proclamation, issued in January, 1863, and the Constitution, adopted (or said to have been adopted) in this state in 1864, not only abolished and prohibited slavery in Louisiana, but also nullified those provisions of the state law prohibiting marriages between free white persons and free people of color; but our understanding of the matter is that, in such cases, the existing law is abrogated or nullified only to the extent that it conflicts with the later and higher law, and, as the question of marriage in this state was not a matter for the Proclamation to deal with, and was not referred to, either in the Proclamation or the Constitution, the existing law upon the subject was not affected by those instruments.

In 1868 (some three years after the attempted marriage between, and acknowledgment by, Luke Delpit and Catherine Doucet, and the year following the death of Doucet) a new state Constitution was adopted, followed by legislation concerning which this court has said:

"The Constitution of 1868 and the statutes subsequently passed \* \* \* were designed to concede to all persons, without distinction or difference of race, or color or previous condition, the privileges of legally intermarrying and thereby legitimating their previously acknowledged issue," etc. Succession of Colwell, 34 La. Ann. 268.

The case thus cited was one in which the children of a white man by a colored woman claimed his succession to the exclusion of his sisters, and in which it appeared that the children were conceived and born during the period when their parents were prohibited on account of racial differences from intermarrying; that in 1878 (after that prohibition had been withdrawn, and after the enactment of a statute, Act 68 of 1870, which declared that natural children might be legitimated by notarial act, "provided that there existed at the time of the conception of such children no other legal impediments to the intermarriage of their natural father and

mother, except those resulting from color or the institution of slavery"), the parents had, by notarial act, declared their children legitimate and had thereafter intermarried. The court, through Bermudez, C. J., said:

"The question to be determined is, simply, whether the marriage \* \* \* legitimated those children. \* \* \* It is clear that if, at the celebration of the marriage, article 95 of the Civil Code of 1825 had preserved its original force, the question would be summarily solved in the negative—[Dupre v. Boulard's Ex'r] 10 [La.] Ann. 411; [Succession of Fletcher] 11 [La.] Ann. 59; [Succession of Minvielle] 15 [La.] Ann. 342; [Kinney v. Commonwealth] 30 Gratiot. [Va.] 858 [32 Am. Rep. 690]—as the marriage would have taken place in the very teeth of a local prohibitory law, and so would have been absolutely null. \* \* \* The fact that the article was expunged from the Revised Civil Code of 1870 is highly significant and telling. \* \* \* In consequence of that repeal the marriage could be, and was, legally contracted."

And after an extended consideration of the changes which had been made in the law by the Constitution of 1868 and the legislation which followed, the court held that:

"Children conceived by persons who at the time were prohibited from contracting marriage on account of disparity of race may, after being duly acknowledged, be legitimated and given the right of heirs, by the marriage of their authors, [duly] celebrated after the impediment has been removed by law."

[2] In the instant case, article 95 of the Code, and the other provisions to which we have referred, having, as we have stated, been in force when the marriage and acknowledgment by Luke Delpit and Catherine Doucet were attempted, that attempt was in violation of a prohibitory law, founded in public policy, and accomplished no legal result, from which it follows that the plaintiffs continued to be unacknowledged natural children; but whether issue of the connection between Luke Delpit and Victoria (or Catherine) Doucet, this record does not enable us to determine, it being admitted, merely, that after her purchase by Delpit "Victoria Doucet bore the children whose names are given in the petition filed in this suit on October 30,

1915," to which it may be added that in the instrument whereby it is said that plaintiffs were acknowledged and legitimated they are referred to without other identification than the following:

"Furthermore, the children of both sexes born to these parties before their legitimate union are, by this act, legitimated."

The case, therefore, falls under the second paragraph of article 918 of the Civil Code, which declares, in effect, that the surviving husband, not separated in bed and board from his wife (in this instance, the intervenor), inherits her estate, in the absence of "lawful" ascendants, descendants, collaterals, or natural children, "duly acknowledged." Succession of Ducloslange, 1 La. Ann. 182; Id., 2 La. Ann. 98; Succession of Briscoe, 2 La. Ann. 268; Montegut v. Bacas, Ex'r, 42 La. Ann. 158, 7 South. 449; In re Nereaux Estate 112 La. 574, 36 South. 594.

The judgment appealed from is therefore affirmed.

#### On Rehearing.

O'NIELL, J. [3] The rehearing granted in this case was restricted to the question whether this court has jurisdiction. The doubt arose from the fact that the amount of money involved in the original proceeding by rule on the bank was only \$736.50.

Our conclusion is that we have jurisdiction of the appeal from the judgment decreeing the plaintiffs in the rule to be illegitimate and annulling, for that reason, the ex parte judgment by which they had been recognized to be the heirs of their deceased sister and sent into possession of her estate. The question of legitimacy of the plaintiffs was not put at issue either by the plaintiffs or the defendant in the summary proceeding against the bank. The only question submitted in the bank's answer to the rule was whether the fund on deposit belonged entirely to the succession of Victoria White Mingo or partly to the marital community, theretofore exist-

ing between her and Smiley Mingo. As the bank had no interest in that question, it deposited the fund in court and passed out of the case without any contest whatever.

Then appeared the so-called intervenor, Smiley Mingo, and sued to have the original plaintiffs declared illegitimate, and to have the judgment recognizing them as legitimate heirs decreed null and void. Although in the prayer of his petition he called it a "petition of intervention," it was couched in the language of an original petition, and was addressed to the court as such. It tendered, for the first time, an issue of which this court alone has jurisdiction; that is, the question of legitimacy of the defendants in the so-called intervention. At that time there was no other contest or suit in which the suit of the so-called intervenor could be considered an intervention or incidental demand. Article 95 of the Constitution declares that an appeal from a judgment rendered on an incidental demand shall go to the court having jurisdiction of the main demand. The purpose of that constitutional provision, as explained in *Thompson v. McCausland*, 137 La. 13, 68 South. 196, was to bring before one and the same appellate court the judgment on the main and incidental demands in one and the same suit. But if, as in this case, the so-called intervention is the only demand or contest before the court, it cannot be regarded as an incidental demand. Nor can it be said to follow the main demand, as far as appellate jurisdiction is concerned, since there is no other contest to be called the main demand. In the decision cited above, it was held that a judgment rendered on a reconventional demand, after discontinuance of the main demand, was appealable to the court having jurisdiction of the amount in contest in the reconventional demand, because there was then no other demand. On the same principle, we conclude that the judgment rendered on the so-called petition of intervention in this case was appealable to the court that

would have had jurisdiction of the demand if it had been an original suit.

The opinion and decree heretofore rendered herein is reinstated and made final.

(78 South. 568)

No. 22472.

**JONES v. KANSAS CITY SOUTHERN RY. CO.**

(Jan. 28, 1918. On Rehearing, April 29, 1918.)

(*Syllabus by Editorial Staff.*)

**1. NEW TRIAL — VERDICT — AMOUNT.**

Although the jury on a second trial, ordered mainly to permit defendant to show contributory negligence, was not bound by the verdict found in the previous trial, it could not increase amount of recovery on the ground that defendant, alleging contributory negligence on the part of a deceased employé, failed to produce any evidence thereof, which inferentially it pretended to be able to produce when it strenuously complained of the ruling under which such testimony was excluded.

**2. APPEAL AND ERROR — TERMINATION OF ISSUES — INSTRUCTIONS.**

In civil cases the Supreme Court will apply the law which is pertinent to the facts and proceed to a proper and final decision of all the issues regardless of the instructions given to the jury.

On Rehearing.

(*Syllabus by the Court.*)

**3. COURTS — 97(5) — DEATH — 95(3) — FEDERAL EMPLOYERS' LIABILITY ACT — AMOUNT OF RECOVERY.**

The state courts are obliged, by rulings of the Supreme Court of the United States, to fix the amount of compensation, if compensation be due to the beneficiaries of a deceased employé, under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), at the present or cash value of what the employé might reasonably have contributed to the support of the beneficiaries during the term of his life expectancy, according to the evidence. The right of recovery being limited to the pecuniary loss, that loss is to be determined or computed by discounting the lost future benefits, at a fair or reasonable rate at which the money might be loaned or invested safely at interest, for each year of the life expectancy.

**4. DEATH — 95(3) — FEDERAL EMPLOYERS' LIABILITY ACT — DAMAGES — LIFE EXPECTANCY.**

In determining the life expectancy of a locomotive engineer, according to the expectation

table constructed from the American Experience Table of Mortality, the court adopts the rule of the insurance companies of adding eight years to the age of the man because of his hazardous occupation.

**5. DEATH — 95(3) — FEDERAL EMPLOYERS' LIABILITY ACT — VALUE OF FUTURE BENEFITS — COMPUTATION.**

The formula adopted in this case for computing the present value of future benefits lost by the beneficiaries of a deceased employé in awarding compensation under the federal Employers' Liability Act is as follows, viz.: Subtract from the annual wages the employé was earning the annual cost of his maintenance, according to the evidence, and multiply the remainder by the number of years of his life expectancy. The result discounted at the legal rate of 5 per cent. for the term of the life expectancy, using annual periods or rests, is the loss of future benefits reduced to present value.

(*Additional Syllabus by Editorial Staff.*)

**6. DEATH — 105 — VERDICT — APPORTIONING DAMAGES.**

The jury is not required by the federal Employers' Liability Act to apportion the award of damages among the beneficiaries of the deceased employé.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Mrs. Nora M. Jones, administratrix of estate of Thos. A. Jones, against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Judgment reduced, and as amended affirmed.

S. W. Moore, of Kansas City, Mo., and Alexander & Wilkinson, of Shreveport, for appellant. Otis W. Bullock and Blanchard & Smith, all of Shreveport, for appellee.

LECHE, J. Plaintiff in this suit prays for the recovery of damages in the sum of \$30,000 for the benefit of herself as widow, and for the benefit of her minor children, alleged to have been suffered on account of the death of Thomas A. Jones, her late husband and father of her said children.

She charges that her said husband, who was a locomotive engineer in the employ of defendant company, was killed while so em-

played in a collision and wreck on defendant's railroad near the city of Shreveport, said collision and wreck being caused by the gross negligence and carelessness of the said defendant and its employes. The defendant being an interstate commerce carrier, plaintiff based her cause of action on the act of Congress which regulates the liability of employers for personal injuries to their employes. Defendant, after unsuccessfully attempting to remove the case to the United States District Court, answered plaintiff's demand, and was after due trial condemned to pay plaintiff the sum of \$17,500. That judgment was appealed to this court, and was affirmed. See 137 La. 178, 68 South. 401.

The case was then brought by writ of error to the United States Supreme Court, and that tribunal reversed our decree on the ground that we had committed error in ruling that evidence of contributory negligence rejected by the trial court for a wrong reason was nevertheless properly excluded, because it was not offered for the specific purpose of mitigating damages, there being no local rule requiring counsel, without inquiry from the court, to announce in advance the purpose for which evidence is tendered. The cause was then remanded to the trial court, in order to afford defendant an opportunity to show, if it could, that deceased had contributed to his death by his own negligence.

Pursuant to the decree of the United States Supreme Court, the case was again tried in the district court for the parish of Caddo, and a verdict was then rendered in favor of plaintiff in the sum of \$26,500, and the present appeal is from a judgment based upon that verdict.

#### Opinion.

Defendant alleges error on the part of the trial judge in his instructions to the

jury. It complains of the failure of the jury to apply the law as charged by the judge, and it also complains of the conclusions of fact reached by this court in its former opinion.

[1] On the last trial, which was ordered mainly for the purpose of permitting it to show contributory negligence on the part of Jones, the deceased, defendant signally failed to establish such contributory negligence. It may be the failure on its part to offer any testimony to that effect which inferentially it pretended to be able to produce, when it so strenuously complained of the ruling under which such testimony was declared inadmissible, that induced the jury to increase the original award of damages from \$17,500 to \$26,500. While the jury in the last trial was in no manner bound by the verdict found in the previous trial, yet, if we are correct in our surmise as to the cause which brought about the substantial increase in the amount awarded, such increase can certainly not be justified on any such ground. That would be penalizing a litigant for availing himself of a defense to which the United States Supreme Court has declared him legally entitled.

[2] We understand defendant's complaint in regard to the instructions given to the jury by the trial judge is not made with a view of having the case remanded. It is now well settled that in civil cases the court will apply the law which is pertinent to the facts, and proceed to a proper and final decision of all the issues, regardless of the instructions which may have been given by the trial judge to the jury, but this complaint is made in order to substantiate the charge of serious error on the part of the jury in its appreciation of the evidence and in awarding plaintiff such a large amount of damages.

The questions of fact at issue herein were thoroughly investigated by this court on

the previous appeal, and a reconsideration thereof as they are presented in the original record, as well as in the present one, has only served to confirm us in the conclusions which we then reached. Defendant contends that we erred when we characterized the movement of the loaded box car which came in collision with the passenger train and caused the death of Jones as resulting from a flying switch. Technically speaking, that was error, but in actual effect it is even more dangerous, and therefore it was greater negligence on the part of defendant to have permitted the loaded box car to be put in motion by gravitation on a descending grade, called in railroad parlance "high lining," than to have imparted that motion on a level track, by means of a locomotive, in order to make a "flying switch."

We are firmly of the opinion that the collision which caused the death of Jones was the result of gross negligence on the part of defendant, and that plaintiff is entitled to recover compensation. The amount of that compensation, due regard being had to the purposes of the law, cannot be fixed with any mathematical certainty, and it is left more or less to the discretion of the courts.

We are most earnestly asked to establish some fixed rule by which it might be gauged, but that function being more properly legislative than judicial, we are unwilling to assume it, however desirable and beneficial such a rule might be.

The original award of \$17,500 made by the jury on the first trial was approved by this court as fair and just, and we see no good reason either to increase or diminish it, and so believing and for the reasons stated.

It is ordered that the amount of the judgment appealed from be reduced from \$26,500, to \$17,500, and, as thus amended, that it be affirmed.

#### On Rehearing.

O'NIELL, J. [3] The Supreme Court of the United States has announced, as a definite rule, that the amount of compensation to be allowed the beneficiaries of a deceased employé, if any be due them, under the federal Employers' Liability Act, is only the cash value of what the employé might reasonably have contributed to the support of the beneficiaries during the term of his life expectancy. That is because the right of recovery is limited to the pecuniary loss suffered by the beneficiaries. And that loss is to be ascertained or computed by discounting the lost future benefits, at a fair or reasonable rate at which the money could be loaned or invested safely at interest, for each year of the life expectancy, according to the evidence. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367; *Spokane & Inland Railroad Co. v. Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125.

[4] We have concluded from the evidence taken on the second trial that Jones was 50 years of age at the time of his death. The evidence shows also that the life expectancy of a locomotive engineer, because of his hazardous occupation, is taken 8 years beyond his age. Accordingly a locomotive engineer 56 years of age is rated at 64. That rule has been adopted by the life insurance experts, and there is no reason why we should not avail ourselves of their knowledge and experience. In fact, we have this strong equitable reason for considering the danger of the occupation: That it is presumed that the employé was compensated for the risk, in the wages he received, and that the beneficiaries will therefore have the compensating advantage of a higher rate of future benefits, in our calculation, than they would have if the risk had been an ordinary one.

The life expectancy of a locomotive engi-

neer aged 56 years, or of an ordinary risk at 64, according to the expectation table constructed from the American Experience Table of Mortality, and therefore according to the reliable theory of chances, is 11.7 years. That is the presumed term of the future benefits of which the beneficiaries in this case were deprived by the death of Jones.

[5] The amount of the future benefits or contributions that the beneficiaries lost is the difference between the amount that Jones would have earned and the amount he would have spent upon himself if he had lived 11.7 years longer. He was earning \$2,100 a year, and, from the evidence of his good habits, we have concluded that \$600 a year is a fair allowance to be made for what he would have spent for his own maintenance. Hence we fix the amount of the lost future benefits at \$1,500 per annum for 11.7 years; that is, a total sum of \$17,550 that would have been equally distributed or contributed in installments during a period of 11.7 years.

The rate of discount to be allowed on the anticipated payments, to reduce them to their present value, is a fair or reasonable rate at which the money could be loaned or invested safely at interest. There is evidence that that rate locally is 6 per cent.; but we think the evidence refers to loans or investments requiring some financial knowledge or ability, and therefore producing returns that are earned, not altogether by the money invested, but in part by the financial ability of the investor. A person without business ability would have to deal with a savings bank, or invest in bonds or other securities of equal standing, paying something like 4 per cent., to make a safe investment at interest. On the other hand, as money does not invest itself, or produce any revenue without investment, its earning power or value is always due, in some measure, to some financial knowledge or ability on the part of its investor. It would therefore

be putting the value of the money too low to adopt the rate of 4 per cent. in discounting the payments to be anticipated in this case. Our opinion is that 5 per cent. is a more appropriate rate, and is fully warranted by the evidence. That is the legal rate of interest—the rate we are constrained to allow when none is stipulated and interest is due. It seems quite equitable that the discount charged to the beneficiaries in computing the present value of deferred payments should be at the rate at which interest would be allowed to the plaintiffs on a past-due claim of similar character.

We have concluded, therefore, to reduce the amount of the judgment in this case to the present value of 11.7 annual payments of \$1,500 each, that is, the net proceeds, or what would be the present or cash value, of \$17,550, payable in 11.7 yearly installments, discounted at 5 per cent. The result of our calculation is that the plaintiffs are entitled to a judgment for \$13,547.64, viz.:

Years.	Amount.	Divisor.	Discount.	Cash Value
1.	\$ 1,500.	1.05	\$ 71.43	\$ 1,428.57
2.	1,500.	1.10	136.36	1,363.64
3.	1,500.	1.15	195.64	1,304.36
4.	1,500.	1.20	250.00	1,250.00
5.	1,500.	1.25	300.00	1,200.00
6.	1,500.	1.30	346.15	1,153.85
7.	1,500.	1.35	388.89	1,111.11
8.	1,500.	1.40	428.57	1,071.43
9.	1,500.	1.45	466.52	1,034.48
10.	1,500.	1.50	500.00	1,000.00
11.	1,500.	1.55	532.26	967.74
11.7	1,050.	1.585	387.54	662.46
Totals \$17,550.			\$4,002.36	\$13,547.64

[6] The jury was not required by the federal Employers' Liability Act to apportion the award of damages among the beneficiaries of the deceased employé. *Central Vermont Railway Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367.

The judgment appealed from is amended by reducing the amount to \$13,547.64, and,

as amended, it is affirmed; the appellant to pay the costs of the district court; the appellees the costs of appeal.

(78 South. 571) ✓

No. 22934.

PUYOULET v. GEHRKE.

In re GEHRKE.

(April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by the Court.)

1. ESCHEAT §7—VACANT SUCCESSION—SEISIN OF STATE.

Where a vacant succession falls to the state, the maxim of "Le mort saisit le vif" does not apply, and the state is not entitled to the seisin of the property depending upon such succession, nor does the state succeed to the deceased or become eo instanti vested with the ownership of such property.

2. ESCHEAT §7—VACANT SUCCESSION—SALE—CLAIMS OF HEIRS OR CREDITORS.

Property depending upon a vacant succession falling to the state remains in such vacant succession until sold, and then the proceeds of sale become the property of the state, subject, however, to the claims of the creditors or heirs of the deceased, if any appear.

3. TAXATION §631—TAX SALE—RIGHTS OF PURCHASER.

Where property of a vacant succession, which had been forfeited and sold to the state for nonpayment of taxes due prior to December 31, 1879, was sold in 1894 by the state under the provisions of Act No. 82 of 1884, the purchaser at such sale who complied with the requirements of said act and paid all taxes since due on said property acquired a good title as against the state.

Action by Pierre Puyoulet against Mrs. Alfred Gehrke. Plaintiff's demand was refused in the district court; judgment of the court of appeal reversed the judgment below, and defendant applies for certiorari or writ of review. Judgment of Court of Appeal reversed, and judgment of district court reinstated and affirmed.

See, also, 136 La. 402, 67 South. 194; 141 La. 935, 75 South. 998.

Benjamin Ory, of New Orleans, for relatrix. A. D. Danziger and E. J. Meral, both of New Orleans, for respondent.

LECHE, J. On August 15, 1916, defendant bound and obligated herself in writing to sell to plaintiff three certain lots of ground situated in the city of New Orleans, for a consideration of \$3,200, cash, of which amount she acknowledged to have received \$320. Plaintiff accepted the above proposal of sale subject to an examination of defendant's title to the property.

The Louisiana Abstract & Title Guarantee Company was employed by plaintiff, and that company, after examining the said title, disapproved the same. The present suit was then instituted by plaintiff to recover double the amount deposited by him with defendant as part of the purchase price, on the ground that defendant's title was suggestive of future litigation and neither clear nor unincumbered.

The district court, being of the opinion that the title tendered by defendant was good and valid, refused plaintiff's demand, but on appeal to the Court of Appeal that judgment was reversed. The findings of the Court of Appeal are now before us for review, and we are asked to reverse the ruling of that court and to reinstate the judgment of the district court.

The admitted facts are as follows: The property was acquired on June 1, 1833, by Isaac Warbeck, who died June 11, 1836; Warbeck's succession was opened, but never was finally closed; Joseph Bres bought the property at tax sale June 25, 1894, for the unpaid taxes of 1876, 1877, and 1878, under an assessment in the name of Isaac Warbeck, the tax collector, acting under Act 82 of 1884; defendant acquired the property at sheriff's sale on December 27, 1900, under an execution issued on a judgment against Bres; the only claim made to the property



on behalf of the state of Louisiana was by Flanagan, administrator, as appears in the decision of this court in the case of Flanagan v. Gehrke, 136 La. 402, 67 South. 194; defendant has paid all taxes assessed against said property since her acquisition of the same.

The record further shows that defendant has been in the quiet, open, and undisturbed possession of said lots ever since she bought them. It seems also to be undisputed that Warbeck left no heirs and that his succession is vacant.

Defendant maintains that her title is valid and pleads in support thereof estoppel, and the prescriptions of 3, 5, 10, and 30 years against the state of Louisiana, the only apparent adverse claimant.

#### Opinion.

Plaintiff refuses to accept the title tendered by defendant on the ground that at the death of Warbeck the property devolved upon the state of Louisiana, and that the ownership of the state has never been divested. He rests his contention on the case of Cordill v. Quaker Realty Co., reported in 130 La. at page 933, 58 South. 819. It appears that a suit was brought by Peter J. Flanagan, acting as public administrator for the parish of Orleans, in order to recover the property in dispute and to have the ownership thereof declared to be in the state. That action was petitory in character, and we held that the public administrator had no authority to institute petitory actions in behalf of the state of Louisiana, and dismissed the suit for want of capacity on the part of plaintiff. See 136 La. 402, 67 South. 194.

[1] The nature of the title which the state may have to this property is therefore again presented to us in another form in this controversy. It is too plain to admit of discussion that if at the death of Warbeck in June, 1836, the full and perfect ownership

of the property became by effect of law vested in the state of Louisiana, all the assessments and sales for taxes subsequently made by the tax-collecting department of the state were absolute nullities, and that the pleas of estoppel and prescription advanced by the defendant can be of no avail. It is not pretended that any part of the public domain could be divested from the state in any such manner. It is only as against titles acquired by the state in proceeding to enforce the payment of taxes that estoppels and pleas of prescription have ever been held to apply.

The law provides in C. C. art. 485, that the successions of persons who die without heirs, or which are not claimed by those having a right to them, belong to the state. Article 929 is to the same effect. ~~Strictly speaking, the state acquires, not as heir, but in default of lawful relations, or of a surviving husband or wife, or acknowledged natural children.~~ But even if the state be considered an heir, that heirship, like that of the surviving husband or wife, or his or her natural children, is, according to articles 878 and 917, irregular. The doctrine of "Le mort saisit le vif" does not apply to irregular heirs. Succession of Allen, 44 La. Ann. 801, 11 South. 42; Succession of Barber, 52 La. Ann. 963, 27 South. 363. The only persons who succeed eo instanti to the deceased are, under the terms of article 940, his legal or testamentary heirs and universal legatees.

From these provisions of our law it is apparent that the seisin which is effected by the operation of law in favor of the legal or testamentary heir or the universal legatee does not attach in favor of the state. In other words, the state is not considered as succeeding to the deceased from the instant of his death. Other provisions of the Code direct the manner in which irregular heirs, who are not invested with the seisin, must demand the possession of the property of the

succession before they can obtain the same. But these provisions make no mention of the state. The articles of our Code (925 and 930) provide for the manner in which natural children and the surviving husband or wife shall be put in possession of the effects of successions falling to them, but there is no similar provision in the Code in favor of the state. The corresponding article (724) of the Code Napoléon, on the other hand, recognizes the right of the state to be placed in possession of the effects of a succession which devolves upon it. Considering that the framers of our Code were guided in their labors by the provisions of the Code Napoléon, it must then be inferred that they purposely refrained from giving such right of action to the state. The question that next arises is, how then is the state to get possession of succession property which, under the terms of articles 485 and 929 of the Louisiana Code, devolves upon it in default of legal heirs? The answer is to be found in the articles 1169, 1196, and 1197, which say that after the expiration of one year from the appointment of the curator of the vacant succession the property should be sold at public auction and the proceeds paid into the hands of the treasurer of the state.

[2] It is evident that the legislative authority never contemplated that succession property which might devolve upon the state in default of legal heirs should be owned and possessed in kind by the state. On the contrary, it is manifest that it is only after such property has been converted into money that the state can obtain full control over it and exercise the right of ownership. It is against the policy of our law to permit the state to own in kind property which may only be adapted to private purposes, or to permit it to compete with its citizens in the acquisition of property which by its nature cannot be devoted to public use. That the state acquires the proceeds and not the property of vacant successions is fully attested by

the articles of all our Constitutions on this particular subject. Whilst the Constitution of 1812 makes no mention of successions devolving upon the state in default of legal heirs, the Constitution of 1845 (article 135), that of 1852 (article 137), that of 1864 (article 144), that of 1868 (article 139), that of 1879 (article 229), and those of 1898 and 1913 (article 254), in creating a free public school fund, uniformly recognize as accruing to the state, not the property, but the proceeds of vacant estates falling under the law to the state of Louisiana. In the Succession of Kate Townsend, 40 La. Ann. 66, 3 South. 488, although the precise issue discussed here was not presented to the court, the final clause of the decree orders that:

"The residue of the property of said succession be turned over and paid into the treasury of the state of Louisiana to be therein deposited and further dealt with according to law."

The court clearly uses the word "property" in the sense of proceeds of the property, as the property itself, whether it was movable or immovable, was not subject to deposit in the vaults of the state treasury.

Our conclusions are that under articles 485 and 929 of the Civil Code, construed in connection with articles 878, 917, and 940, the state does not succeed to the deceased in vacant successions, and therefore does not eo instanti become vested with the ownership of property depending upon such successions; that by article 1196 the state may only acquire the custody and control of the funds arising from the sale of property of vacant successions; and that by article 1204 "these funds may be made use of" for the purposes mentioned in article 254 of the Constitution, "but their reimbursement is provided for and guaranteed on the faith of the state, so that the heirs who present themselves meet no delay in receiving them."

We therefore further conclude that the ownership of the property involved in this controversy never was vested in the state of Lou-

isiana, but remained in the succession of Warbeck, and that if the state ever acquired any title to that property it could only have done so by forfeiture or by sale for non-payment of taxes.

We appreciate that these conclusions are in conflict with those expressed in the case of *Cordill v. Quaker Realty Co.*, 130 La. 933, 58 South. 819, but the defense urged in the present suit was not called to our attention in that case.

Believing, then, that the property which defendant bound herself to sell to plaintiff did not devolve upon the state, and that it continued, after the death of Warbeck, to belong to his succession, the other issues here involved present little difficulty.

[3] The sale of June 25, 1894, to Joseph Bres, made by authority of the state, under Act 82 of 1884, so far as the record shows, was legal and valid and divested the state of any title which it might have acquired at previous tax sales. The plaintiff does not attack the regularity of this sale, but only questions its binding effect as against the state on the grounds which have already been disposed of, and there is then no necessity of considering the pleas of estoppel and prescription.

For these reasons the judgment of the Court of Appeal for the parish of Orleans is avoided and reversed, and that of the district court is reinstated and affirmed.

(78 South. 574)

No. 22840.

RAINES et al. v. DUNSON et al.

(Oct. 29, 1917, and April 1, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by Editorial Staff.)

On Motion to Dismiss Appeals.

1. APPEAL AND ERROR ⇐801(1)—MOTION TO DISMISS—QUESTION OF FACT.

On motion to dismiss appeals on the ground that the judgment appealed from had been ac-

quiesced in by plaintiffs by partial execution thereof, presenting a question of fact on the letters annexed to the motion and the denial of their effect, the cause will be remanded to the court below to take testimony on the question, and the consideration of the case would be continued until such evidence was taken and filed.

(Syllabus by the Court.)

On Motion to Dismiss Appeals.

2. APPEAL AND ERROR ⇐162(1)—“ACQUIESCENCE IN JUDGMENT.”

The receipt by the appellant of a portion of the amount decreed to him by a judgment is acquiescence in the judgment and defeats an appeal.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Acquiescence in Judgment.]

3. APPEAL AND ERROR ⇐162(1)—ACQUIESCENCE IN JUDGMENT—RESERVATION.

The acquiescence is not affected because the appellant, receiving part of the amount of the judgment, undertakes to reserve his appeal. The reservation cannot avoid the effect the law attaches to the acquiescence in the judgment.

O’Niell, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Separate actions by D. H. Raines and by Joe Herndon against C. E. Dunson and others. Judgment for defendants, dismissing the two actions, and plaintiffs in each action appeal, and R. T. Layne, styling himself an “intervener,” seeks general relief. Appeals dismissed, and intervener denied any relief.

Barret & Files, of Shreveport, for appellants. Alexander & Wilkinson, of Shreveport, for appellees. Barret & Files, of Shreveport, and Blanchard & Smith, of Shreveport, for R. T. Layne.

On Motion to Dismiss Appeals.

SOMMERVILLE, J. The two plaintiffs, in separate actions, sued the defendants for the cancellation of two certain mineral leases of ground located in the parish of Caddo. These two cases were subsequently consolidated, and tried together. There was judgment in favor of the defendants, dismissing

the two suits of the plaintiffs; and plaintiffs have appealed.

[1] The defendants now move to dismiss the appeal on the ground that the judgment appealed from has been acquiesced in by the plaintiffs, by a partial execution thereof, and they annex to their motion copies of letters, addressed by the plaintiffs to the defendants, which authorize a dismissal of the appeal. Plaintiffs have answered the motion to dismiss, and set up that the letters referred to by plaintiffs have been recalled, and allege that there has been no acquiescence, in whole or in part, in the judgment appealed from by them.

There is thus presented a question of fact upon which evidence will have to be taken before a proper disposition of the case may be made.

It is therefore ordered that this case be remanded to the First judicial district court for the parish of Caddo for the purpose of taking testimony upon the alleged acquiescence by plaintiffs in the judgment appealed from, and consideration of the case is continued until such evidence is taken and filed.

#### On Motion to Dismiss Appeals.

The motion to dismiss the appeals in these consolidated cases is based on the alleged partial acquiescence by plaintiffs in the two judgments appealed from by them, as evidenced by copies of letters addressed by each plaintiff to C. E. Dunson and S. P. Harrel, two of the defendants, of date September 12, 1917, stating that:

"In consideration of your promise of immediate development I have this day written to my attorneys, Messrs. Barret & Files, authorizing and instructing them to 'dismiss the appeal' in the aforesaid case as soon as the same is lodged in the Supreme Court in so far as same affects the following described land, to wit: [Describing portions of the land involved in these suits and covered in both of the leases from plaintiffs to defendants.] If Messrs. Barret & Files, my attorneys, should through any oversight fail to 'dismiss the said appeal' in so far as the afore-

said described lands are concerned, why then this shall be your authority to file in the Supreme Court and have said appeal dismissed, reserving, however, my right to prosecute said appeal in so far as the balance of the said land is concerned; and the release of the aforesaid described land is in no way to be considered or construed as being an acquiescence in the judgment of the lower court."

The two letters were similar in all respects, except as to the descriptions of the lands, and they were signed by the plaintiffs respectively.

Defendants moved to dismiss the appeals of both plaintiffs, and that motion was opposed by plaintiffs, who alleged that their signatures to the two letters had been "obtained through the misrepresentation that it was satisfactory to" their attorneys; "that said letters were recalled and canceled as soon as the facts were presented to said J. H. Herndon and D. H. Raines [plaintiffs], and letters were immediately signed, directed to the attorneys herein, to continue the appeals and to prosecute same to final judgment;" and they attached copies of said letters of date September 26, 1917.

Thereupon an order was issued to take testimony on the alleged acquiescence by plaintiffs in the judgments appealed from. That evidence is now before us.

It appears that plaintiffs are colored men, who own separate tracts of land in the oil fields of Caddo parish, which they leased to defendants under leases covering the usual terms of oil leases. One lease was dated October 23, and the other October 27, 1916.

May 30, 1917, plaintiffs entered separate suits against the defendants for the avoidance and annulment of the leases. The cases were consolidated and tried June 26, 1917, and argued and submitted July 9, 1917. Judgments were rendered July 30, 1917, in favor of defendants, and both plaintiffs appealed to this court.

[2] The judgment in each case simply rejected plaintiff's demands, at his cost. The

judgments, in each case, are indivisible, and acquiescence in any part thereof would have the effect of destroying appeals therefrom. *Jolley v. Vivian*, 131 La. 937, 60 South. 622; *Sims v. Jeter*, 129 La. 262, 55 South. 877.

On July 25, 1917, after the cases were submitted, and before judgments were rendered, the two plaintiffs entered into two other contracts of lease with R. T. Layne of the lands embraced in the leases with defendants. Layne testified that he knew of the leases to defendants, and that suits were pending for their annulment.

After the judgments were rendered in defendants' favor, they, plaintiffs, without the knowledge of counsel on either side, compromised their differences as to portions of the land in controversy, as is evidenced by the letters of plaintiffs addressed to Messrs. C. E. Dunson and S. P. Harrel, two of the defendants, and copied herein, wherein they refer to an agreement between them and say:

"In consideration of your promise of immediate development I have this day written to my attorneys, Messrs. Barret & F'iles, authorizing and instructing them to 'dismiss the appeal' in the aforesaid case as soon as same is lodged in the Supreme Court in so far as same affects" portions of the lands involved in the suits.

Both plaintiffs took the witness stand, and testified that they signed the letters addressed to the defendants, authorizing the dismissal of the appeals.

Joe Herndon said that he signed the letters at his home, that they were read over to him, that he understood them, that no false statements were made to him to obtain his signature, and that he had not seen either Dunson or Harrel with reference to the letters. He was not asked if any representation had been made to him that the letters were satisfactory to his attorneys.

The witness further stated that he did not wish to sign the letters recalling and canceling the letters he had written to Dun-

son and Harrel, but his counsel had said that Mr. Layne could come in and take all of his share of the oil produced, and that he signed the letters recalling the first letters because he was afraid Mr. Layne would take his oil and break him up. He further said that he wanted Mr. Dunson, one of the defendants, to have his land, and that "I wanted quick production on it."

D. H. Raines, the other plaintiff, testified that he read and understood the letters, that he signed them willingly, that no misrepresentation was made to him and that no fraud or persuasion was used to obtain his signatures, that his real purpose in signing was to get immediate development of his property, and that defendants had gone to drilling at once. When asked if he was told that the letter was satisfactory to his attorneys, the witness said that his attorneys were not mentioned.

The evidence is quite conclusive that plaintiffs did not sign the letters addressed to defendants because of an error of fact on their part, or because of any misrepresentation or fraud on the part of defendants. After the judgments against plaintiffs and in favor of defendants had been rendered, they (plaintiffs and defendants) agreed to settle their differences as to portions of the leased lands, so as to have those portions of land developed immediately, and to get possession of oil which might be drained therefrom by other wells in the vicinity.

Plaintiffs thereby acquiesced in part in the judgments against them, defendants are working under the agreement entered into, and plaintiffs have authorized the dismissal of their appeals in so far as portions of the land are concerned.

Having acquiesced in the judgments, which are indivisible, they abandoned their appeals; and the motions to dismiss will be granted.

[3] The reservation made by plaintiffs of the right to prosecute their appeals in so far as portions of the land were concerned, and other declarations to the effect that what they had agreed to concerning certain portions of the land should not be considered or construed as being an acquiescence in the judgment of the trial court, are not binding on this court, and they are without effect.

In the case of *Flowers v. Hughes*, 46 La. Ann. 436, 15 South. 14, the court said:

"The receipt by the appellant of a portion of the amount decreed to him by the judgment is acquiescence in the judgment and defeats the appeal. C. P. art. 567; [*Campbell v. Orillion*] 3 La. Ann. 115; [*Cobb v. Hynes*] 4 La. Ann. 150; [*Fluhart v. Golding*] 7 La. Ann. 233; [*Succession of De Egana*] 18 La. Ann. 64; [*Stinson v. O'Neal*] 32 La. Ann. 947.

"Nor is this acquiescence at all affected because the appellant, receiving part of the amount of the judgment, undertakes to reserve his appeal. The reservation cannot avoid the effect the law attaches to the acquiescence in the judgment. [*Succession of De Egana*] 18 La. Ann. 64."

In discussing this point in the *Succession of De Egana*, 18 La. Ann. 59, the court said:

"The party who voluntarily executes, either partially or in toto, a judgment rendered for or against him, or who voluntarily acquiesces in or ratifies, either partially or in toto, the execution of that judgment, is not permitted to appeal from it."

R. T. Layne, the second lessee of plaintiffs' lands, alleges that whatever judgment may be rendered in the case will affect his leases and his rights thereunder, and asks that he be made party plaintiff and appellant herein, and to be permitted to join in and to prosecute the appeals of plaintiffs and appellants. But as the appeals of plaintiffs will be dismissed, and no judgment rendered in the cause, it is useless to consider his application.

The two plaintiffs, appellants, joined by

R. T. Layne, calling himself "intervener," now represent "that the defendants and appellees have acquiesced in and recognized the title and ownership of plaintiffs and appellants and the intervener of the property in controversy, and they "pray that said cause be remanded to the district court, that the evidence may be adduced proving the facts alleged herein, and for general relief."

Movers allege that the two plaintiffs leased certain oil lands, hereinbefore referred to, to defendants, and that plaintiffs subsequently leased the same lands to Layne; that subsequent to the appeal defendants sold parts of their leases to the Clarke & Greer Company, Incorporated; that the Clarke & Greer Company, Incorporated, thus became the agents and representatives of defendants, and by their purchase from Fullilove of portions of Layne's leases defendants "recognized and acknowledged the lease contract held by R. T. Layne, intervener herein, and acquired by him from" plaintiffs; and that they "have estopped themselves from contesting the validity of said leases," and they ask that the case be reopened and remanded to take evidence on the point.

The validity of the leases from plaintiffs to Layne was not an issue of the case; they were not in existence at the time of the trial and submission of the cause. They are not in the record. Defendants did not contest their validity, and the subsequent alleged recognition of same by defendants cannot affect the issue before the court, which is the validity of the leases from plaintiffs to defendants.

The motion to remand is denied, and the appeals are dismissed, at plaintiff's costs.

O'NIELL, J., dissents.

(78 South. 576)

No. 23019.

STATE v. COLEY et al.

(April 29, 1918.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Jerry Cline, Judge.

Bon Coley and Jim Perry were convicted of operating a blind tiger, and they appeal. Conviction and sentence affirmed.

A. R. Mitchell, of Lake Charles, for appellants. A. V. Coco, Atty. Gen., and J. Sheldon Toomer, Dist. Atty., of Lake Charles (Vernon A. Coco, of New Orleans, of counsel), for the State.

LECHE, J. Defendants were found guilty of operating a "blind tiger," and their present appeal is submitted without brief or argument. The record contains no bill of exception, and discloses no error to the prejudice of the accused.

The conviction and sentence appealed from are affirmed.

(78 South. 582)

No. 22493.

UNION NAT. BANK v. UNITED STATES FIDELITY &amp; GUARANTY CO.

(Feb. 25, 1918. Rehearing Denied April 29, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$ 840(4) — APPEALABLE ORDERS — OVERRULING ON EXCEPTION OF NO CAUSE OF ACTION.

An exception of no cause of action which has been overruled in the trial court and all rights thereunder have been reserved by defendant in its answer, may on appeal by defendant be argued and considered in the appellate court.

2. NATIONAL BANKS — EMBEZZLEMENT BY CASHIER—STATUTE.

"Any cashier. \* \* \* who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association [a national bank] \* \* \* shall be imprisoned not less than five years nor more than ten." Rev. St. U. S.  $\S$  5209 (Comp. St. 1916,  $\S$  9772).

3. BANKS AND BANKING  $\S$ 256(3)—NATIONAL BANKS — EMBEZZLEMENT BY CASHIER — ELEMENTS—INTENT TO DEFRAUD.

"The crime of embezzlement from a national bank by an officer, clerk, or agent, within Revised Statutes, 5209, involves two general elements: one a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such

possession need not have been exclusive of that of other officers, clerks, or agents; and, second, wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. \* \* \*

"The intent to injure or defraud. \* \* \* need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done." United States v. Breese (D. C.) 131 Fed. 915; United States v. Heinze (C. C.) 161 Fed. 425.

4. BANKS AND BANKING  $\S$ 256(3)—NATIONAL BANK—EMBEZZLEMENT BY OFFICER.

The embezzlement or "misapplication of the funds of a national bank by an officer without the knowledge or consent of the bank \* \* \* is not changed, as to its criminal character, by the fact that the act subsequently became known to the officers of the bank, and that they impliedly consented thereto, by taking no action in regard to it." Rieger v. United States, 107 Fed. 916, 47 C. C. A. 61.

5. EMBEZZLEMENT  $\S$ 1—DEFINITION.

"Embezzlement is the fraudulent appropriation of property by a person to whom such" property "has been intrusted, or into whose hands it has lawfully come." Moore v. United States, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422; State v. Roubles, 43 La. Ann. 200, 9 South. 435, 26 Am. St. Rep. 179.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzlement.]

6. BANKS AND BANKING  $\S$ 256(3), 257(3) — NATIONAL BANK — EMBEZZLEMENT — EVIDENCE.

"As evidence that overdrafts on the bank by its president were made with intent to abstract or misapply its funds it may be shown that at the time of the overdrafts it was hopelessly insolvent, that this was due to its assets being notes of wholly irresponsible persons, and that these notes had been used by the president in connivance with the cashier, who was the director, and another director to give him fictitious credit.

"The acts and intent of the president \* \* \* in obtaining money \* \* \* on worthless securities being such as to make him guilty of embezzlement, abstraction, or willful misapplication of its funds it is immaterial that his acts were committed, sanctioned, or ratified by the other officers of the bank, with knowledge of the facts." Breese v. United States, 106 Fed. 680, 45 C. C. A. 535.

(Additional Syllabus by Editorial Staff.)

7. PRINCIPAL AND SURETY  $\S$ 155—FIDELITY BOND—CAUSE OF ACTION—PETITION.

A petition alleging that the cashier of a national bank abstracted its money in his pos-

session and control, and converted it to his own use to the pecuniary loss of the bank, and that such acts amounted to an embezzlement, stated a cause of action against the surety on his bond conditioned to make good and reimburse the bank for any loss by reason of the fraud or dishonesty of the cashier in connection with the duties of his office amounting to embezzlement or larceny.

**8. PRINCIPAL AND SURETY  $\S$ 155 — ACTION ON SURETY BOND—PETITION.**

A petition in an action against the surety on the bond of the cashier of a national bank covering his embezzlement or larceny need not be phrased in the technical language which would have been used in an indictment or information charging embezzlement or larceny.

**9. PRINCIPAL AND SURETY  $\S$ 79 — FIDELITY BOND—EMBEZZLEMENT BY CASHIER OF NATIONAL BANK.**

In a suit against the surety on the bond of the cashier of a national bank, conditioned to reimburse the bank for any loss from his fraud or dishonesty amounting to embezzlement or larceny excepting liability for his acts or omissions under instructions from his employer, or for any mere error of judgment or bona fide mistake, evidence that he was a stockholder, a director, and a member of its board, and indorsed notes of concerns in which he was a stockholder or officer and which he knew to be insolvent, and discounted notes of such concerns and his own notes without proper security, and overdrew his own account and borrowed a mortgage note for a few days so as to attach it temporarily to one of his own so as to have his note discounted and abstracted a bill of lading attached to a draft for collection and gave it to the consignee, a company with which he was connected, without collecting the draft, all without instruction from his employer or superior officer, showed an embezzlement, and not a mere error of judgment or bona fide mistake.

Appeal from Sixth Judicial District Court, Parish of Ouachita; Ben C. Dawkins, Judge.

Action by the Union National Bank, by H. F. Thomas, receiver, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed in favor of the People's Investment Company, Incorporated, substituted for plaintiff.

Stubbs, Theus, Grisham & Thompson, of Monroe, and J. Zach Spearing, of New Orleans, for appellant. Hudson, Potts, Bernstein & Sholars, of Monroe, for appellee.

SOMMERVILLE, J. May 10, 1907, the defendant executed a bond as surety of H. D. Apgar, cashier guaranteeing the Union Bank & Trust Company in a sum not to exceed \$10,000 that it would—

"make good and reimburse to the said employer by reason of the fraud or dishonesty of the said employé in connection with the duties of his office or position amounting to embezzlement or larceny and which have been committed during the continuance of said term, or of any renewal thereof."

The bond further provided that the defendant shall not be liable—

"for any act or thing done or left undone in obedience to or in pursuance of any instructions or authorization received by him (Apgar) from the employer or any superior officer or for any mere error of judgment or bona fide mistake, or any injudicious exercise of discretion on the part of the employé (Apgar) in or about all or any matters wherein he shall have been vested with discretion," etc.

The Union Bank & Trust Company was, on March 4, 1912, nationalized, and became the Union National Bank, and the bond was renewed from year to year, until the bank was closed by some one connected with the national banking affairs of the government; and this is a suit by the receiver against the defendant as surety or guarantor on said bond for the full amount thereof.

The petition is long, and it would serve no useful purpose to refer to each one of the 42 articles contained in it.

It recites numerous transactions by notes, indorsements, renewals, and overdrafts by which Apgar, while acting as cashier of the bank, became indebted to the bank in a sum far in excess of the amount of the bond.

Defendant filed an exception of no cause of action, which was overruled. It then answered that the matters charged against Apgar were not fraudulent and dishonest, and did not amount to "embezzlement or larceny" of the funds of the bank. Further, that what was done by Apgar was with the authorization of the other officers of the bank; or they were errors of judgment; bona fide mis-



takes; or that the indebtedness was the result of an injudicious exercise of the discretion which had been vested in him.

There was judgment for plaintiff for the full amount of the bond, and defendant has appealed.

Defendant has filed the following assignment of errors in this court:

(1) The district court erred in not sustaining the exception of no cause of action.

(2) The district court erred in holding that the evidence showed that H. D. Apgar had committed any act of "fraud or dishonesty" in connection with his position or office as cashier "amounting to embezzlement or larceny," or that the evidence shows any want of authorization by the board of directors or superior officers to make the loans complained of; but, on the contrary, the evidence shows affirmatively that the principal, H. D. Apgar, committed no crime "amounting to embezzlement or larceny," and that the testimony shows affirmatively that the loans complained of, both by overdrafts and notes, were made with the authorization and approval of the superior officers and board of directors, and that while many of the loans were probably injurious to the bank, they were "the injudicious exercise of discretion on the part of the employé," which acts are specially exempted from liability under the terms of the bond.

[1] Plaintiff objects to the consideration by the court of the exception filed by defendant. The exception was overruled, and in its answer defendant reserved its rights thereunder. It is therefore properly before the court. It is peremptory in its nature, and, as such, might have been filed at any time in the course of the proceedings. *Rogers v. Southern Fiber Co.*, 119 La. 714, 44 South. 442, 121 Am. St. Rep. 537.

Plaintiff refers to the case of *Lykiardopoulos v. New Orleans & C. R., Light & Power Co.*, 127 La. 314, 53 South. 575, Ann. Cas. 1912A, 976, in support of its position. It has

no application here. A ruling on an exception of vagueness, and not on a peremptory exception, was therein disposed of.

The bond sued on was attached to and made part of the petition, and the two documents will be considered together in considering the exception.

Assuming the numerous irregularities resulting in heavy loss to the bank, and detailed in the petition, to have been practiced by Apgar, defendant argues that they did not amount "to embezzlement or larceny" on his part, and that it is not alleged that Apgar was not authorized to do the things enumerated in the petition by his employer or any superior officer, or that any of the alleged misappropriations were not authorized, or that there were errors other than errors of judgment and mistakes, or that those things were done without the consent of the bank.

[7] We are of the opinion that the transactions of Apgar enumerated in the petition, taken together with article 40 thereof, shows a cause of action against defendant on the bond issued by it to make good and reimburse the bank for any loss "by reason of the fraud or dishonesty of the said employé in connection with the duties of his office or position amounting to embezzlement or larceny," and which were committed during the continuance of the bond, to the extent of \$10,000.

The said article 40 of the petition is as follows:

"Petitioner shows that the said Harvey D. Apgar (for himself and the above-named partnerships, of which he was a member, and his copartners thereof, and W. B. Clarke) did, on the several dates alleged, take and abstract the aforesaid and respective sums of \$23,433.65, \$4,800, \$1,325.78, \$3,207.92, \$3,250, \$2,500, \$2,314.50, \$876.95, and \$17,960, of the moneys, property, and funds belonging to the Union National Bank, which said moneys, property, and funds were, at the time of such taking and abstraction, in the immediate possession, custody, and control of the said Harvey D. Apgar as cashier of the said Union National Bank. And, thereupon, your petitioner is advised, and upon which advice avers the fact to be, that the said Harvey D. Apgar converted the aforesaid \$23,433.65, \$4,800, \$1,325.78, \$3,207.92, \$3,250,

\$2,500, \$2,314.50, \$876.95, \$17,960 to his own use; and petitioner is advised and therefore alleges that the act and acts of the said Harvey D. Apgar, as herein above related and set forth, with respect to the said transaction, amounted to embezzlement or larceny of the said money and property, and that, as a result and consequence of the act and acts of the said Harvey D. Apgar amounting to embezzlement, the said Union National Bank sustained a pecuniary loss to the amount of the aforesaid sums of \$23,433.65, \$4,800, \$1,325.57, \$3,207.92, \$3,250, \$2,500, \$2,314.50, \$876.95, \$17,960, by reason of the fraud and dishonesty of the said Harvey D. Apgar, in connection with the duties of his office and position, amounting to embezzlement, and which said acts of fraud and dishonesty amounting to embezzlement were committed during the continuance of the renewals of the aforesaid bond No. 302933-7."

[2] The embezzlement charged is that covered by section 5209, U. S. R. S. (U. S. Comp. St. 1916, § 9772), which provides:

"Any \* \* \* cashier [of a national bank], \* \* \* who embezzles, abstracts or willfully misapplies any of the moneys, funds, or credits of the association \* \* \* shall be imprisoned not less than five years nor more than ten."

[3] And in construing this section it was held in *United States v. Harper* (C. C.) 33 Fed. 471:

"The crime of embezzlement from a national bank by an officer, clerk, or agent, within Revised Statutes, 5209, involves two general elements; one a breach of trust or duty with respect to moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession might not have been exclusive of that of other officers, clerks, or agent; and, second, wrongful appropriation of such funds, moneys, or credits to his own use with intent to injure or defraud the association or others.

"The intent to injure or defraud need not willfully have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done."

[8] The petition is not phrased in the technical language which would have been used in an indictment or bill of information charging Apgar with embezzlement or larceny; but the use of such language was not necessary in a civil suit. In the petition he is charged with having taken and abstracted

from the bank certain sums aggregating nearly \$60,000, which were in his custody, which he converted to his own use; and which taking amounted to embezzlement or larceny on his part.

There was no error in overruling the exception.

[9] We are also of the opinion that the court correctly held that Apgar had committed acts of fraud and dishonesty amounting to embezzlement while serving as cashier of the bank.

The evidence shows that H. D. Apgar was a stockholder and the cashier of the plaintiff bank; was one of its executive officers, a member of the board of directors, and a member of the discount board. He was also a stockholder or officer of several insolvent concerns, which he knew to be insolvent. It also shows that he overdrew his own account, and permitted the several concerns with which he and members of his family were connected to do the same thing. He indorsed the notes of these concerns, and he discounted his own notes and the notes of said companies without proper or adequate securities. He borrowed a mortgage note for a few days so as to attach it temporarily to one of his own, so as to have his note discounted. He abstracted a bill of lading which was attached to a draft for collection, and gave it to the consignee, one of the companies with which he was connected, without collecting the draft. These many misappropriations were done by Apgar on his own initiative, and not "in obedience to, or in pursuance of, any instructions or authorization received by him from his employer or any superior officer." They were not errors of judgment, or bona fide mistakes, or the injudicious exercise of discretion in matters where he had been vested with discretion, or by instruction or by the rules and regulations of his employer.

The other officers of the bank were not con-

sulted by him in making these misappropriations; they did not authorize them, and they had no knowledge of the existence thereof. Some of the officers testified that at their monthly meetings Apgar, or his assistant, read aloud all the discounts and loans which had been made during the preceding month; but they did not learn of them until after they had been granted by the cashier, and they did not know whether they were renewals or not, or whether the amounts had been increased or not from month to month. They approved of what had been done, without informing themselves of the true condition of affairs.

This failure of duty on the part of the remaining directors of a national bank cannot excuse the conversion or embezzlement of funds of the bank by the cashier. Having taken the funds of the bank for the use of himself and others, without the knowledge or consent of the bank officials, Apgar was guilty of the crimes charged in the petition.

[4] The embezzlement or "misapplication of the funds of a national bank by an officer without the knowledge or consent of the bank, \* \* \* is not changed, as to its criminal character, by the fact that the act subsequently became known to the officers of the bank, and that they impliedly consented thereto, by taking no action in regard to it." *Rieger v. United States*, 107 Fed. 916, 47 C. C. A. 61.

"The intent to injure or defraud the bank within the meaning of the section does not necessarily involve malice or ill will toward the bank, for the law presumes that a person intends the necessary and natural consequences of his acts, and it is sufficient that the wrongful or fraudulent act will necessarily or actually injure or defraud the bank." *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; *United States v. Youtsey* (C. C.) 91 Fed. 864.

[5, 6] In the course of a well-considered

opinion, the district judge thoroughly reviewed the evidence on each transaction charged in the petition, and he said, in part:

"The bank was almost wholly under the direction of Apgar.

"At the organization of the national bank, March 4, 1912, it took over the assets and property of the Union Bank & Trust Company. Among the bills receivable was an indebtedness by the Vollmer-Apgar Auto Company, represented by notes amounting to \$8,904, and on October 8, 1913, the checking account of said firm showed an overdraft of \$4,749.24. To cover this overdraft a note for \$5,066.65 was executed by said firm and indorsed to H. D. Apgar and M. P. Vollmer, and the net proceeds of \$5,000 placed to its credit. Thereafter, through a series of overdrafts and renewals, the principal and interest of said indebtedness increased to the sum of \$23,433.65 at the date the bank was closed. In addition to the sum mentioned, on February 19, 1915, less than four months prior to the bank's failure, a note of L. T. Apgar, indorsed by the cashier, was discounted with the bank, and its proceeds, \$2,500, passed to this firm's credit also, making the total amount of the bank's funds received by the auto company, with accrued interest which had been added to the principal, the sum of \$25,966.95. When the firm first began doing business with the bank it was known as the Vollmer-Apgar Auto Company, but some time during the latter part of December, 1913, or first of January, 1914, H. D. and L. T. Apgar bought out the interest of M. P. Vollmer, and it became known as the Apgar Auto Company, composed of H. D. and L. T. Apgar. The new firm assumed all the old firm's debts, including the notes held by the plaintiff bank, and M. P. Vollmer was released from his indorsements thereon; all paper being indorsed instead by the two Apgars. The firm was a commercial partnership, and, besides, the individual members were indorsers on all its paper at the bank. L. T. Apgar was without commercial standing, save such as was enjoyed by virtue of his interest in the firm; he having no other property. Since the bank's failure, the Apgar Auto Company's affairs have been liquidated and less than \$2,000 has been realized therefrom.

"Concurrently with the accumulation of the above indebtedness, the Louisiana Wagon & Woodstock Manufacturing Company, a corporation in which H. D. Apgar was a stockholder, by a similar system of overdrafts and renewals, the overdrafts being covered by notes, became indebted to the plaintiff bank in a large sum, amounting at the date of its failure to more than \$60,000. Up to the time it reached \$20,000, he was an indorser thereon with other officers and stockholders of said company, but some time about the latter part of 1913 he ceased to indorse its paper, though by private

understanding with other indorsers he remained liable therefor.

"In addition to the indebtedness due the bank which accrued as above set forth, the said H. D. Apgar was, on or about the 1st of December, 1913, indorser on paper of the Monroe Stationery Company, a corporation managed by another son, P. F. Apgar, in a sum in excess of \$11,000. On December 18, 1913, the said H. D. Apgar placed to the credit of his personal account as the proceeds of two notes secured by mortgage of one Luther M. Fairbanks a net amount of \$17,960. The maturities of these notes were April 1, 1921 and 1923, respectively. He then drew against this deposit and took up the Monroe Stationery Company note, amounting to \$11,200, and subsequently withdrew the remainder of the deposit on his personal check. It will be observed that these notes, which were for equal amounts, had about  $7\frac{1}{2}$  and  $9\frac{1}{2}$  years respectively to run before maturity, and for all practical purposes it was merely shifting the debt with an increase of more than \$6,500. The whole of the purchase price of the property which had been bought by Fairbanks was approximately \$100,000, on which an initial cash payment of \$2,500 had been made. Three or four years before, H. D. Apgar and G. P. Stubbs, who were stockholders of the Central Immigration Real Estate & Loan Company, had bought the same property for approximately one-third of that amount. During 1914 and 1915, H. D. Apgar also owed the Bank of Commerce, of St. Louis, or some one else to whom the indebtedness was shifted during that time, the sum of \$6,500, and a like sum of \$6,500 to the Commercial National Bank of New Orleans. He also owed another bank, the name of which does not appear in the record, a further sum of \$1,000 to \$2,000, besides another note due the Union National Bank for \$5,000, on which W. R. Mitchell and Percy Sandel were indorsers. He was also indorser on another note held by the last-mentioned bank, made by the Central Immigration Real Estate & Loan Company amounting to \$7,958.64. He was also indorser on another note for \$1,500 made by other persons for some railroad project, but which was later absorbed by receiver's certificates of the Arkansas, Louisiana & Gulf Railway Company. To this should also be added the sum of \$3,207.92, consisting of an overdraft existing in his account on February 18, 1915, and which was taken up with a part of the proceeds of a certain note of W. B. Clarke for \$4,800 discounted on that date.

"Thus the liabilities of H. D. Apgar, both primary and secondary, had risen at the date of the failure of the bank, to the huge amount of approximately \$120,000. This, of course, takes into consideration the Fairbanks notes which he had discounted with the bank.

"Against this, as best we can gather from the record, he owned the following property: 168 shares of Union National Bank stock of the par value of \$100 per share, but with such real

value during this time as the condition of the bank gave it; an interest in the Central Immigration Real Estate & Loan Company, amounting on the face of the papers to approximately \$25,000, but with such real value as the circumstances with reference to the lands sold to Fairbanks mentioned above justified; also some stock in the Central Savings Bank & Trust Company, the exact amount of which does not appear in the record; some stock in the Louisiana Wagon & Woodstock Manufacturing Company, the value of which also fails to appear in the record, but from the evidence of its large indebtedness to the bank still unpaid would seem to have been small, if anything; possibly a small amount of stock in the Ouachita Abstract & Title Guaranty Company; his half interest in the Apgar Auto Company, whatever that may be worth, considering that its assets under liquidation realized less than \$2,000; and his home, valued at from \$5,000 to \$6,000. From this it will be seen that the value of his assets is very indefinite, but the witness M. W. Haas, who was assistant cashier under Apgar, places a net value upon his property of approximately \$25,000 to \$30,000. He seemed to be reasonably familiar with Mr. Apgar's holdings. However, if this was not correct, the principal of defendant in the bond, H. D. Apgar, was present in court, consulting with counsel for defendant, and could easily have cleared the matter up. Not having done so, we conclude that the figures named were at least approximately correct.

"There were, of course, other persons on some of the obligations mentioned above besides Apgar, but, taking all things into consideration, we think the record reasonably establishes that he was insolvent from about the 1st of January, 1914. At least, his affairs were in such shape that he, as a reasonably prudent banker, should have known, and did know, that he was not entitled to any further loans or advances from the bank of which he was cashier without giving proper security or collaterals. This is especially true by virtue of the knowledge which he had of the condition of the affairs of the various concerns he was interested in, to whom and on whose paper he advanced the bank's money.

"Having thus concluded that he was insolvent on or about January 1, 1914, it becomes important to determine whether or not he had any reasonable expectation of meeting or paying the various obligations on which he received and used the bank's funds. In other words, it is the intention with which the acts were done that must determine their character, i. e., whether criminal or not. \* \* \* It would not amount to embezzlement, or any other crime, if Apgar overdrew his account, or, through others, that of firms or companies in which he was interested, provided he or they had a reasonable expectation of being able to pay, such as assets or property out of which payment could be had. And the same applies

to loans made to himself or concerns in which he was interested. On the other hand, if neither he nor they had any such resources, and overdraw their accounts in large amounts, in the manner stated, or he loaned himself and them large sums of money without security, he being the controlling power who effected such dispositions of the bank's money for his own and their benefit, then in law and in fact he was guilty of embezzlement, because of the implied or presumed intention to injure or defraud. *United States v. Breese* (D. C.) 131 Fed. 915; *United States v. Heinze* (C. C.) 161 Fed. 425. \* \* \*

"Not only must Apgar be held to a knowledge of the condition of his affairs and those of the firms in which he was interested who received the bank's funds, but, as an evidence of his knowledge and intent, he persisted and insisted on paying the checks of the auto firm when it had no funds, notwithstanding its large and growing indebtedness, and in the face of objections and remonstrances on the part of the assistant cashier and other employes in the bank. They would turn down checks, and he would subsequently order them paid, or pay them himself. None of the notes representing this large indebtedness on the part of the auto company were ever made in the customary manner of applications regularly passed on and loans made, except the one made by L. T. Apgar for \$2,500, but were made by overdrafts. Neither were any collaterals ever given, except as later herein mentioned, and the only payments ever made on principal or interest was \$150 at one time, and \$1,100 at another. During all this time, 100 shares of his Union National Bank stock was pledged for more than its par value; his Central Immigration Real Estate & Loan stock was also pledged for more than its par value, and this, together with the Fairbanks notes absorbed in December, 1913, had about consumed his interest in that company; his Central Savings Bank & Trust Company stock was pledged to the plaintiff bank; the Apgar Auto Company was insolvent; and the Louisiana Wagon & Woodstock Company's affairs were heavily involved, if it were not insolvent also. Under such circumstances, can it be said that he was acting in good faith? This question can be more satisfactorily answered after consideration of the evidence in support of the other items of complaint in the petition.

"It was not necessary that a benefit accruing directly to Apgar should be shown.

"The evidence must show a withdrawal of the funds, a conversion of them to the use of the defendant or some one other than the bank. The evidence need not show personal benefit to the defendant.' *Dow v. United States*, 82 Fed. 904 [27 C. C. A. 140]; *United States v. Kenney* (C. C.) 90 Fed. 257; *Breese v. United States*, 106 Fed. 680 [45 C. C. A. 535]."

Each item of the petition was considered by the judge with similar results in each in-

stance, and in discussing the overdrafts of Apgar he correctly cited the law to be:

"An overdraft on a national bank may be legal or criminal according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence. *United States v. Heinze* [C. C.] 161 Fed. 425.

"We have concluded that the overdraft was made with the intent to injure or defraud. \* \* \*

"What the defendant did was to draw checks and pay them out of the funds of the bank, of which he was in lawful possession, when he had none to his individual credit. It was not necessary that his possession and control of the funds should have been exclusive.

"If his position and employment gave the defendant a superior or a joint and concurrent possession with subordinate employes or agents of the bank, that would be sufficient to place him in such lawful possession as would enable him to commit the crime of embezzlement in relation to assets of the bank so committed to his keeping.' *United States v. Harper* (C. C.) 33 Fed. 474-476.

"The fact that the checks were regularly drawn and charged in his account with the bank can make little difference, if the funds were used with the legal intent to injure or defraud.

"As evidence that overdrafts on the bank by its president were made with intent to abstract or misapply its funds, it may be shown that at the time of the overdrafts it was hopelessly insolvent; that this was due to its assets being notes of wholly irresponsible persons; and that these notes had been used by the president in connivance with the cashier who was the director and another director to give him fictitious credit.

"The acts and intent of the president \* \* \* in obtaining money \* \* \* for worthless securities being such as to make him guilty of embezzlement, abstraction, or willful misapplication of its funds, it is immaterial that his acts were committed, sanctioned, or ratified by the other officers of the bank, with knowledge of the facts.' *Breese v. United States*, 106 Fed. 680 [45 C. C. A. 535].

"We therefore conclude that the cashier embezzled the bank's funds to the extent of \$3,207.92 in connection with the W. B. Clarke note, and that plaintiff is entitled to recover against the surety to that extent.

"Apgar was, by resolution of the board of directors of the bank passed December 3, 1913, authorized to furnish collaterals to relieve himself on indorsements for considerable amounts then held by the bank. On December 18, 1913, instead of furnishing said collaterals, he discounted two mortgage notes of Luther M. Fairbanks for \$8,980, each maturing April 1, 1921, and April 1, 1923, respectively, and deposited the proceeds, \$17,960, to his personal account. He then drew a check against this account for \$11,200 and took up a note of the

Monroe Stationery Company, a corporation managed by another son, P. F. Apgar, and on which he was indorser for that amount. The remainder of the sum so deposited was used by him for his personal benefit. This was done without further consulting any one of the officers of the bank, except that he informed the assistant cashier, when approached about the matter, that he was relieving himself of certain of his indorsements. The precarious character of this paper has been indicated heretofore. To say the least, no discreet banker would have for a moment considered the proposition to discount those notes as was done. \$17,960 of the bank's funds were thereby tied up for a long period of years. Even conceding that the notes were perfectly good, he did not have the right, either morally or legally, to so appropriate the bank's funds. As an experienced banker, he was necessarily charged with knowledge of this fact, and to take its money under such circumstances, without consulting the other officers and directors of the bank, when he was personally receiving the benefit of his position and connection with the bank, was equivalent to embezzlement, even if he had not known the uncertain value of the paper, and regardless of his own financial position. He attempted thereby to relieve himself of \$11,200 of indebtedness to the bank by substituting Fairbanks in his stead with such security as was afforded by the mortgage. The result was to injure, and, under all circumstances, the bank was defrauded, either by virtue of a loss of the Monroe Stationery note for \$11,200, or the difference between the real value of the Fairbanks notes and what Apgar really received. The evidence shows that the notes were worth, on account of the mortgage, about \$6,000, and that outside of this Fairbanks, as a resident of another state, was not in such shape that the money could be made out of him. We think that the bank, under the better view, lost the difference between the real value of the notes, \$6,000, and \$17,960, the amount received by Apgar under the discount. The authorities cited heretofore apply with equal force to this transaction, and the bank is entitled to recover on the bond. The remarkable part of it is that the matter stood from December 18, 1913, until the bank was closed on June 9, 1915, about a year and a half, without any protest coming from the board of directors or other officers of the bank. The only way that it can be accounted for is that some of these officers were in like circumstances with reference to the bank, that is, large debtors, and with the irregular and pertunatory reading and supervision of the bank's loans it was overlooked. Some of the officials have so testified.

"The failure of this bank was brought about largely through the acts of the cashier and those with whom he was associated or connected in business. The Vollmer-Apgar Auto Company and the Apgar Auto Company and L. T. Apgar, for the use and benefit of this firm in which and for which the cashier was interested

as a commercial partner and indorser of its paper, received over \$25,000 of the bank's funds, and an additional \$2,314.50 by his surrender to it of the bill of lading for cars in the Bernstein Bros. transaction, and for which the bank is liable as bailee. What has been said about other transactions and the law applicable thereto also governs this indebtedness. The overdrawing of that firm's account in the circumstances, brought about by his orders and directions, was in law embezzlement on his part of its 'moneys and funds.'

"There are many other circumstances and matters in the record received on the question of good faith and intent, among which was the proof of forgery of the indorsement of G. P. Stubbs on the note of the Central Immigration Real Estate & Loan Company for \$2,240 in the fall of 1914, the proceeds of which, \$2,200, went to his personal account. This and other things speak strong of the financial burdens under which he was laboring, and reflect the intent and purpose with which the accounts were overdrawn and the bank's funds used.

"The sum total of the moneys, funds, credits, etc., of the bank embezzled largely exceeds the amount of the bond, and the plaintiff is entitled to judgment for the entire amount thereof, that is, the sum of \$10,000."

The People's Investment Company, Incorporated, has been substituted for plaintiff, and the judgment appealed from is affirmed in favor of said company.

O'NIELL, J., concurs in the decree.

(78 South. 587)

No. 22870.

CITIZENS' HOMESTEAD ASS'N v.  
DUGUE.

(April 29, 1918.)

(Syllabus by the Court.)

1. INJUNCTION  $\Leftrightarrow$  164—SUFFICIENCY OF SURETY—DETERMINATION.

A plaintiff, whose proceeding by executory process to collect a mortgage debt due him has been stopped by injunction on the averment that the property seized belongs to the person suing out the injunction, is entitled to test, by a summary proceeding, the validity or sufficiency of the surety on the injunction bond during the vacation of the district court for the parish of Orleans.

2. INJUNCTION  $\Leftrightarrow$  148(1)—BOND—SUFFICIENCY OF SURETY.

A surety on an injunction bond is insufficient where the property he owns is so much

involved as to make it hard to be reached and uncertain as to what it might bring at a forced sale.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Executory proceeding by the Citizens' Homestead Association against Mrs. Sarah Dugue, in which Miss Lillian J. Johnston obtained an injunction, and from a judgment dissolving and setting aside the injunction for the insufficiency of the surety on the injunction bond plaintiff in injunction appeals. Affirmed.

E. A. O'Sullivan, of New Orleans, for appellant. Edward B. Ellis and Meyer S. Dreifus, both of New Orleans, for appellee.

SOMMERVILLE, J. This is an executory proceeding which has been enjoined by Miss Lillian J. Johnston, who claims, in her petition for an injunction to be the sole owner of the property seized by plaintiff in this proceeding. She obtained an injunction to prevent the sale of the property on a bond for \$750, which, on motion of plaintiff, was dissolved and set aside, on the ground that the surety on the bond was not good and solvent, as the law required he should be. The case was not tried on its merits, and the judgment did not dispose of the case in any way. Plaintiff in injunction has appealed from the judgment dissolving and setting aside the injunction.

[1] On the trial of the motion to dissolve, objection was made that it could not be tried on August 30, 1917, during the vacation of the civil district court of the parish of Orleans, wherein the case was pending. The objection was overruled, and a bill of exceptions was reserved to the ruling.

The motion to dissolve the injunction was triable during vacation of the civil district court, as it was an interlocutory order, under the act of 1896, and the judgment thereon did not involve any action upon the merits of the case.

A similar point was presented in the case of *May v. Phillips*, 105 La. 129, 29 South. 486, wherein it was held that a motion to dissolve an injunction might be tried on any legal day in the year.

This ruling was made under the provisions of Act No. 4 of 1896, p. 5, the first section of which act reads as follows:

"Be it enacted by the General Assembly of the state of Louisiana, that the civil district court for the parish of Orleans shall be opened at 11 o'clock a. m., and shall remain open until 3 o'clock p. m., unless business assigned for the day be earlier concluded, from the 15th day of October to the end of the month of June, in each year, except from Christmas to the second day of January. For granting interlocutory orders; issuing any and all writs; trials of rules to quash same, and not upon merits; and for the purpose of trying proceedings instituted, or on appeal therein by a landlord for the possession of leased property, partition proceedings, and for such special probate and insolvency business, as the court en banc may by rule determine, said court shall remain open on all legal days during the whole year, and any judge thereof present in the parish is authorized to act in the premises in cases allotted to a judge absent from the parish, or unable to hold court or to act, with all of the powers of said absent judge."

[2] The evidence introduced on the trial shows that the surety on the bond of plaintiff in injunction was not such surety as is contemplated by the law. The burden of proving the sufficiency or legal capacity of a surety on a judicial bond is on the party who tenders the surety, and plaintiff in injunction has failed to show the sufficiency of the surety on the bond furnished by her in this case. The bond was signed by her attorney, who testified that he was worth between \$4,000 and \$5,000, consisting of real and personal property. One piece of real estate was acquired by him from a homestead company for \$4,000, upon which, he testified, the homestead company had a mortgage of \$3,100. But the surety did not produce a statement from the homestead association to whom a mortgage of \$4,000 was payable that this mortgage had been reduced in any amount.

Besides, there was a further mortgage of \$500 recorded against this property, which had not been canceled from the records of the mortgage office, although the witness testified that the same had been paid. He failed to produce the canceled note for this mortgage. The property was too heavily involved to be considered a proper security for any amount whatever outside of the mortgage held by the homestead company.

The witness also testified that he owned five lots of ground in the Homedale section of the New Orleans Land Company, for which he had agreed to pay \$1,500, and against which there existed a mortgage for the balance of \$877.60. But, on cross-examination, he admitted that he bought this property by what is called a "bond for title"; that is, a contract whereby the vendor agrees to make title to property to the vendee, provided the vendee pays in full within a given space of time. The contract further provided that in event the vendee failed to make payment in accordance with the terms of the contract the vendor was at liberty to consider the contract abrogated, and all payments which had been made on account of the purchase forfeited to the vendor. Such title can hardly be considered an asset in the hands of a surety.

He further testified that he owned a lot of ground in the parish of Jefferson worth \$80, and that he owned a lot on Washington avenue, near Hagan avenue, valued at \$300, and that this latter piece of property was subject to redemption. That piece is in the name of the witness as security for a debt. It cannot be considered as a valuable asset of the surety. The surety also testified that he owned a law library and office furniture on which he owed \$300, and also household furniture. The library and office furniture, and most household furniture, are exempt from seizure, and they can hardly be considered as a valuable asset of a surety on a judicial bond. A list of household furniture was not given, so

it is impossible to determine how much of it was liable to seizure.

The surety also testified that he owed about \$600; that he was a surety on a bond for \$500; and that he was surety on another bond for \$250, which had been forfeited. He further testified that he had sufficient money in the bank to pay the forfeited bond, but he had not paid it at the date of the trial. He said his bank account showed a credit of \$400.

We are of the opinion that the surety on the bond is insufficient, and that the judgment of the district judge in declaring him to be so is correct, and that the injunction was properly dissolved.

The judgment appealed from is affirmed.

O'NIELL, J., concurs in the decree.

(78 South. 589)

No. 22498.

BEHAN v. JOHN B. HONOR CO., Limited,  
et al.

(June 30, 1917. On Rehearing, April 29, 1918.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ~~§~~376(2)—EMPLOYERS' LIABILITY ACT—COMPENSATION—LATENT DISEASE.

The fact that an employé, injured in performing services arising out of and incidental to his employment in the course of his employer's occupation, was already afflicted with a dormant disease that might some day have produced physical disability is no reason why the employé should not be allowed compensation, under the employers' liability statute, for the injury which, added to the disease, superinduced physical disability.

*(Additional Syllabus by Editorial Staff.)*

2. MASTER AND SERVANT ~~§~~385(20)—EMPLOYERS' LIABILITY ACT—AMOUNT OF COMPENSATION.

Where the wages of an employé were such that it was impracticable to compute the "average weekly wages" by the method first indicated in Employers' Liability Act (Act No. 20 of 1914) § 3, the compensation allowed on the alternative statutory method of taking the average weekly amount earned by another employé in the same grade, employed at the same work un-



der the same employer during the 12 months preceding the accident, was so nearly accurate that it would be approved.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by John Behan, employé, against the John B. Honor Company, Limited, employer, and the New Amsterdam Casualty Company, insurer, for compensation under the Employers' Liability Act. Compensation allowed, and defendants appeal, and plaintiff, answering the appeal, prays that the compensation be increased to the amount sued for. Judgment affirmed.

J. C. Henriques, of New Orleans, for appellants. E. M. Stafford and Howell Carter, Jr., both of New Orleans, for appellee.

O'NIELL, J. While the plaintiff was working as longshoreman for the John B. Honor Company, a skid that he was attempting to remove from the ship to the wharf slipped and caused him to fall into the river. He fell upon some wooden piling or stringers and hurt his head and spine. This suit was brought against the employer and the latter's liability insurer, for compensation, under the Employers' Liability Act, Act No. 20 of 1914. The plaintiff claimed compensation at the rate of \$10 a week for 400 weeks, less certain payments he had received. The district court allowed him compensation at the rate of \$6.50 a week, for 400 weeks, less the credits. The defendants prosecute this appeal; and the plaintiff, answering the appeal, prays that the compensation allowed be increased to the amount sued for.

The only defense urged—and it was not specially urged in the answer of either of the defendants—is that the plaintiff's disability was not caused by the accident, but is the result of a disease that was lurking in his system before the accident.

There is scientific evidence in the record that the plaintiff was, after the accident and

at the time of the trial, afflicted with locomotor ataxia—what physicians call tabes dorsalis—and that an accident such as the one on which this suit is founded could not, of itself, have produced that disability. But it also appears from the expert testimony that the one and only disease that does cause locomotor ataxia can remain dormant and undiscovered in the human system a very long time; that there have been cases where the disease did not assert itself within 20 years from the time of infection. There is no proof in this case that the plaintiff would be now or ever disabled by locomotor ataxia if the accident he complains of had not happened. On the contrary, until the accident, he was apparently in ordinary sound health, attending to his daily occupations, unconscious of being diseased, working regularly, earning large wages, and supporting his wife and daughter. The injuries he suffered by the accident, and the immediate change in his physical condition, leave no reasonable doubt that the accident superinduced, and was the proximate cause of, the disability of which he complains. He was rendered unconscious by the injury to his head and spine, and remained unconscious more than 24 hours after the accident. The surgeon who first attended him at the hospital found that he had concussion of the brain. He remained in the hospital two weeks, and was then taken in an ambulance to his home, not that he had recovered sufficiently, but because, as the surgeon in charge of the hospital testified, "About that time some change was made in the company handling these cases." His arms and legs were yet paralyzed, and he remained confined to his room, physically helpless, in the care of a physician, nearly two months longer. The paralysis that had immediately followed the accident was succeeded by, as if it had developed into, what the attending physician suspected was locomotor ataxia, or tabes dorsalis. On his ad-

vice, a specialist on nervous and mental diseases was consulted, and his diagnosis and tests confirmed and proved the correctness of the opinion of the attending physician.

The proof goes no further, in support of the defense of this suit, than to show that the plaintiff might, and perhaps would, at some time, have become disabled by the disease that was lurking in his system, even if the accident complained of had not happened. And that is not much more of a defense than to say that every man must some day come to the end of his worldly career, accident or no accident.

[1] The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not been diseased at the time of the accident. But the accident was, none the less, the proximate cause of the present disability. We are not aware of a decision of this court on the subject, but it is well settled in the jurisprudence elsewhere that the fact that a person was already afflicted with a dormant disease that might some day produce physical disability is no reason why he should not be allowed damages or compensation for a personal injury that causes the disease to become active or virulent and superinduces physical disability. See *Hilliard v. Chicago City Railway Co.*, 163 Ill. App. 282; *Larson v. Boston Electric Railroad Co.*, 212 Mass. 262, 98 N. E. 1048.

The rulings in the two cases cited by the learned counsel for the defendants, decided by the Industrial Accident Commission of California (*Hansen v. Patterson Ranch Co.* and *Johnson v. Lowe*, vol. 2 Reports of Industrial Accident Commission of the State of California, pp. 767 and 543), were based upon facts that distinguish them from the present case. In *Hansen's Case*, it was proven that the disability due to the accident could not have lasted longer than three weeks, and that the remaining disability was due to the

onset of paresis. In *Johnson's Case*, the proof was that the 7 weeks, for which compensation was allowed, was ample time for complete recovery from the injury complained of, being an injury to his wrist, and that the remaining ailment was due to a disease that he had before the accident.

[2] The plaintiff worked some times as screwman and some times as longshoreman. As screwman his wages were \$6 a day, and as longshoreman 40 cents an hour for a day of 10 hours, 60 cents an hour for night work, and 80 cents an hour on Sundays. The evidence is that he had a good reputation as a workman, and his services were in demand. Hence it seems that his average weekly wages should have been enough to allow him compensation at the maximum rate of \$10 a week. But the Employers' Liability Act is so worded that it would be extraordinary for any laboring man to show that his average weekly wages amounted to enough to allow him the maximum rate of compensation. The plaintiff in this case, like most of the longshoremen, worked for a number of stevedores. During the year preceding the accident, he had worked principally as screwman; but, at the time of the accident, he was employed as longshoreman. It was therefore impracticable to compute the "average weekly wages" by the method first indicated in section 3 of the Act No. 20 of 1914. The judge adopted the alternative method, provided by the statute, of taking the average weekly amount earned by another employé in the same grade, employed at the same work and by the same employer, during the 12 months preceding the accident. Accordingly the rate of compensation allowed by the judgment is so nearly accurate that it is approved.

The judgment appealed from is affirmed at the cost of the appellants.

LECHE, J., takes no part.

## On Rehearing.

LECHE, J. We have considered again the issues presented in this case, and do not find any error in the judgment.

The decree heretofore rendered is reinstated and made final.

O'NIELL, J., was absent during the argument on rehearing.

(78 South. 590)

No. 22881.

KOEPPING et al. v. MONTELEONE.

(April 29, 1918.)

*(Syllabus by the Court.)*

1. TUTOR OR GUARDIAN—RIGHT OF ACTION.

"Any person who has been, or shall be, appointed tutor or guardian of any minor residing out of the state of Louisiana, but within the United States, and who has qualified as such in conformity with the laws of the state or country where the appointment was made, shall be entitled to sue for and recover any property, rights, or credits belonging to the minor in this state upon his producing satisfactory evidence of his appointment as aforesaid, without being under the necessity of qualifying as tutor of the minor according to the laws of Louisiana." Civ. Code, art. 363.

2. INFANTS — 78(1)—SURVIVING PARENT — SUIT IN BEHALF OF CHILD.

A surviving parent, who is not the qualified tutor or tutrix of his or her minor child, cannot sue on behalf of his or her minor child.

3. PARTIES — 76(1)—OBJECTION TO CAPACITY OF PLAINTIFF—TIME FOR FILING.

An exception to the capacity of a plaintiff to sue and stand in judgment must be filed in limine.

4. LIMITATION OF ACTIONS — 85(2) — PRESCRIPTION — SUSPENSION — FUGITIVE FROM JUSTICE.

Being a fugitive from justice does not suspend prescription as to claims of persons residing in other states against the fugitive from this state.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by Mrs. Caroline Koeppling and others against Bernardo (or Ben) Monteleone. Ex-

ceptions sustained, and suit dismissed, and plaintiffs appeal. Affirmed.

Frank B. Davenport and Benjamin T. Waldo, both of New Orleans, for appellants. E. Howard McCaleb, of New Orleans, for appellee.

SOMMERVILLE, J. This is a suit sounding in damages, which was filed by the plaintiff September 30, 1913, for damages alleged to have been inflicted upon her daughter, aged 14 years, by the defendant, in the months of January and February, 1912, and for damages to herself resulting from the torts committed upon her daughter.

Plaintiff appears in her individual capacity, as the widow of William Davis, and now the wife, by a second marriage, of Henry Koeppling, and also for the use of her minor child, Irene Davis, all residents of Chicago, Ill.

The suit is based upon an alleged breach of promise of marriage on the part of the defendant made to plaintiff's daughter, seduction, and other offenses extremely revolting and degrading, which are unnecessary to be recited here. Plaintiff's claim for damages to herself individually is based upon the humiliation, shame, and mortification resulting to her, as well as for certain expenses incurred by her because of the alleged wrongful acts of defendant.

Plaintiff alleged in her original petition that defendant was "formerly a citizen and domiciled in the city of New Orleans, but now a fugitive from justice, who has fled the law to parts unknown at present to your petitioner," and she asked that a curator ad hoc be appointed to represent the defendant, an alleged absentee, upon whom service of citation and copy of petition might be made. She subsequently alleged that the appointment of a curator was inadvertently applied for and made, and she asked that his ap-

pointment be annulled, and the order appointing him recalled, which was done.

In a supplemental petition, filed June 14, 1917, plaintiff alleged:

"That at the time of filing the original petition herein the defendant, Bernardo (or Ben) Monteleone, had a known place of domicile in this city at the Monteleone Hotel, and that he was at the stated period a fugitive from justice," etc.

She further alleged that he was represented in the city of New Orleans by certain persons as attorneys in fact, and she asked that they be cited and served, which was done. Upon the showing by these persons that they were not the attorneys in fact of defendant, plaintiff filed a second supplemental petition, in which she alleged:

"That petitioner is informed, and so avers, that as said defendant is a fugitive from justice, he has retained his domicile or residence, or the domicile he left in this city, and within the jurisdiction of this honorable court; that petitioner is informed, and thus avers, that a resident of this state forfeits his domicile by a voluntary absence of two years, but the absence of said defendant is not voluntary, but under compulsion, for the sole purpose of avoiding arrest under the act of Congress of June 25, 1910. \* \* \* Petitioner further avers that the said defendant, Bernardo (or Ben) Monteleone, on the 6th day of October, 1910, made application for registration in the office of the registrar of voters in the parish of Orleans, and was duly registered under certificate No. 197 therein; that his residence was 1905 St. Charles avenue; that said defendant thus established his political and civil domicile and retained such domicile at the date of the filing of the original petition herein. Petitioner further avers that at the date of filing the original petition the defendant, Bernardo (or Ben) Monteleone, had also a residence in the Hotel Monteleone, at the corner of Royal and Iberville streets, in this city; that the said Hotel Monteleone was the last place of residence of the said defendant prior to his forced departure from the city of New Orleans. Petitioner also further avers that, inasmuch as the said defendant has been compelled to leave the jurisdiction of this honorable court to avoid prosecution, the domicile of the defendant has not been forfeited by such involuntary absence, but that the civil status of said defendant is simply suspended pending his return, and this honorable court has jurisdiction *ratione personæ*, and that citation and service of same according to law directed to one or both of his last places of domicile should issue herein, and that such

citation is sufficient, proper and complete citation in fact and in law."

Domiciliary service was thereupon made upon defendant August 30, 1917; and he appeared through counsel October 16, 1917, and filed the following exceptions:

"Now comes Ben Monteleone, and for exceptions to plaintiff's original, supplemental, and amended petitions, for the use and benefit and in behalf of her child, Irene Davis, says:

"(1) That plaintiff is without right or capacity to represent said minor, or to stand in judgment herein for said minor, and that said minor is without authority or capacity to institute and maintain this suit or to stand in judgment herein.

"(2) And for exception to plaintiff's original, supplemental and amended petitions, on her own behalf, exceptor pleads the prescription of one, three, and five years."

Exception No. 1: This exception is taken to the right or capacity of plaintiff to represent her minor child in this suit, or to stand in judgment herein for her, and the right of the minor herself to institute and maintain the suit or to stand in judgment herein.

[1, 2] Plaintiff alleges that the marriage between her and the father of the minor herein involved was dissolved by the death of her husband; and she does not allege that she is the tutrix or has been appointed tutrix or guardian of her minor child. The suit is brought simply in her capacity as the mother of her minor daughter; both of whom are domiciled in Chicago, Ill. The law provides that:

"Any person who has been, or shall be, appointed tutor or guardian of any minor residing out of the state of Louisiana, but within the United States, and who is qualified as such in conformity with the laws of the state or country where the appointment was made, shall be entitled to sue for and recover any property, rights, or credits belonging to the minor in this state, upon his producing satisfactory evidence of his appointment as aforesaid, without being under the necessity of qualifying as tutor of the minor according to the laws of Louisiana." C. C. art. 363.

Plaintiff, as has been stated, does not allege that she has been appointed tutrix or guard-

ian of her minor child in the state of Illinois. She was therefore without authority to institute this suit on behalf of her minor child.

As regards minors residing in this state, the law is:

"Minors, persons interdicted or absent, cannot sue, except through the intervention or with the assistance of their tutors or curators." C. P. art. 108.

As there is no allegation in plaintiff's petition as to the law of her domicile, or that it is different from the law of this state, the presumption is that the law of Illinois is the same as the law of this state, and that minors cannot sue "except through the intervention or with the assistance of their tutors or curators." The law is clear and explicit; and it contains an express prohibition against minors suing in the courts of the state, except with the assistance of their tutors or curators.

In the case of *Mayes v. Smith*, 11 Rob. 503, where a father, after the dissolution of the marriage, styled himself the natural tutor of his minor children, and appointed an agent and attorney in fact to institute suit for him, and an exception was filed in limine to *Mayes* appearing in court for his children when he had not taken oath as natural tutor, the court say:

"We are of opinion that the exceptions were well taken, and ought to have been sustained, and the suit dismissed.

"Minors can only sue by their tutor, duly qualified to act as such. Even the natural tutor is required to take an oath before he can do any act as such. C. C. art. 328 (334). A judgment pronounced against minors would not be res judicata as to them, without its appearing that the person, claiming to represent them" was judicially appointed. This difficulty "is not cured by suing in the name of the minors themselves, assisted by their father. They cannot sue in their own names; it is their tutor alone who can sue in his [own] name. \* \* \*

And in the case of *Mitchell v. Cooley*, 12 Rob. 636, where an exception was filed to plaintiff's right and authority to sue as natural tutor of his children on the ground that he was not qualified to act in that capacity,

never having taken the oath required by law, the case of *Mayes v. Smith*, supra, was affirmed; and the suit was dismissed.

The law places the minor, not emancipated, in this state, under the authority of a tutor, after the dissolution of the marriage of his father and mother. C. C. art. 246. And he can only act through such tutor duly appointed and qualified.

Plaintiff contends that in the case of *Williams v. Pope Mfg. Co.*, 51 La. Ann. 185, 24 South. 779, the suit of a mother (who had been deserted by her husband in Mississippi), for herself and minor child, was sustained, and the right of the mother to bring suit on behalf of the child was recognized. In that case the company excepted on various grounds, one of which was that there was an improper and illegal joinder of parties plaintiff, there being two distinct actions and demands, prosecuted by and for two plaintiffs, cumulated in the same petition. Other exceptions were also filed; but the exception above noted was the only one passed upon by the district court and reviewed by this court.

In passing upon the case, the court said:

"For the purpose of the trial of the exception of misjoinder and improper cumulation, the capacity of Mrs. Williams to sue individually and on behalf of her minor daughter must be admitted. For the purpose of the suit the mother is assimilated to the character of tutrix of her daughter."

The judgment appealed from was reversed, and the case was remanded for trial. On the new trial, the other exceptions filed in the suit were sustained; and the plaintiff took a second appeal to this court. 52 La. Ann. 1417, 27 South. 851, 50 L. R. A. 816, 78 Am. St. Rep. 390.

[3] In disposing of the exception to the right or authority on the part of plaintiff to prosecute the demand for the use and benefit of her minor child, the court, noting that there had been no dissolution of the marriage between plaintiff and her husband, and that the latter had simply disappeared, cited arti-

cle 81, C. C., as sufficient authority for plaintiff to sue in behalf of her minor daughter. That article reads:

"If a father has disappeared, leaving minor children born during his marriage, the mother shall take care of them and shall exercise all the rights of her husband with respect to their education, and the administration of their estate."

And it was also said that the father and mother "owe protection to their children, and of course they may, as long as their children are under their authority, appear for them in court in every kind of civil suit." C. C. art. 235. And the court proceeded to say, as such authority was conferred upon the father and mother jointly when both are present, that it stood to reason that the mother should be authorized to act separately and alone "in case the father had disappeared." Under such circumstances it was held that the mother, residing in Mississippi, was authorized to appear in court in this state in behalf of her minor child, and claim the damages due her by the defendant, and stand in judgment therefor.

The court did not discuss article 246 et seq. and article 328, C. C.; articles 108 and 109, C. P., in the Williams Case; and in that case the exception to the capacity of plaintiff to sue was not filed first. It followed other exceptions which had the effect of admitting the plaintiff's capacity to sue.

The exception to the capacity of plaintiff to stand in judgment in this case was excepted to in limine. There was no other exception or plea filed which might have had the effect of admitting the capacity of the plaintiff to sue.

We have also been referred to the decision of the court in the case of Creagh v. New Orleans Ry. & Light Co., 128 La. 305, 54 South. 828, which was brought by a mother, who had married a second time, for personal injuries to her minor son of a former marriage. In that case Mrs. Creagh sued as the natural tutrix of her son; and

no exception was filed in limine to her capacity to sue. That exception appears to have been filed in the answer; and plaintiff qualified as natural tutrix before the trial of the case on the merits. It was there said:

"The general rule of law is that any person, natural or artificial, may sue in the courts of the country."

And the exception in the answer was overruled. The codal provisions were not referred to or considered in that case.

In view of the law that minors, after a dissolution of the marriage of their parents, must be placed under the authority of a tutor, and the prohibition contained in article 108, C. P., to the effect that "minors cannot sue except through the intervention of or with the assistance of their tutors or curators," the exception to the capacity of plaintiff to sue and stand in judgment herein was properly sustained.

[4] Exception No. 2: This exception is taken to plaintiff's petition for damages in her own behalf; and the prescription of one, three, and five years was pleaded.

The tort complained of by plaintiff is alleged to have occurred in the months of January and February, 1912, and suit was not instituted until September 30, 1913, more than one year thereafter, and citation upon defendant was not made by domiciliary service until August 30, 1917.

It is argued on behalf of plaintiff that, inasmuch as defendant is alleged by her to be a fugitive from justice, that prescription was and is suspended during his absence from the state; but she refers to no law to sustain her position.

She refers to an exception to the general law contained in Act No. 148 of 1898, § 1, p. 262, which provides, with reference to citizens of this state:

"That no prescription shall run against any claims, rights, or causes of action, held or asserted by a citizen of the state of Louisiana, against a former citizen or resident of this

state, who shall be a fugitive from justice and who shall be without a representative or agent upon whom legal process may be served."

But plaintiff is not a citizen of the state of Louisiana. She alleges herself to be a citizen of Chicago, in the state of Illinois.

In the case of *Smith v. Stewart*, 21 La. Ann. 67, 99 Am. Dec. 709, where the claim of suspension of prescription was urged because of the existence of the Civil War during the years 1862-66, which covered the date of the tort complained of in that case, the article of the Code 3457 was quoted to the effect that:

"Prescription is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law."

And article 3521 (3487) was quoted, which declares:

"Prescription runs against all persons, unless they are included in some exception established by law."

Plaintiff has not suggested any exception established by law in her favor. The exceptions are enumerated in the Code and in the act of 1898. The defendant, being a fugitive from justice, is not among the exceptions established by law in favor of a citizen of another state who has a claim against the fugitive.

Article 3541 (3506) says:

"The prescription mentioned in the preceding article, and those described above in paragraphs I and II, run against minors and interdicted persons, reserving, however, to them their recourse against their tutors or curators. They run against persons residing out of the state."

Here is express provision of law declaring that prescription runs against plaintiff in this cause.

In discussing the law of prescription, Mr. Chief Justice Marshall, in *McIver v. Ragan*, 2 Wheat. 25, 4 L. Ed. 175, said:

"Whenever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the excep-

tion. It would be going far for this court to add to those exceptions."

And the Supreme Court of the United States held, in the case of *Bank of the State of Alabama v. Dalton*, 9 How. 522, 13 L. Ed. 242:

That "acts of limitation furnish rules of decision, and are equally binding on the federal courts as they are on state courts, is not open to controversy; the question presented is one of legislative power, and not practice. \* \* \* The act itself makes no exception in favor of a party suing under the circumstances of these plaintiffs. So the Supreme Court of Mississippi held in the case of *McClintock v. Rogers*, 12 Smedes & M. [Miss.] 702; and this is manifestly true on the face of the act. The Legislature having made no exception, the courts of justice can make none, as this would be legislating."

The Legislature of this state might have established an exception to meet the contingencies of this case, but it has not; and the court cannot.

The Code has furnished a rule, and it is imperative, even if that rule is shown to be defective, and careful and weighty considerations of policy are appealed to in favor of another view. The remedy is in the hands of the Legislature. In *Cox v. Von Ahlefeldt*, 105 La. 544, 582, 30 South. 175, where suit was instituted on behalf of an imbecile who had not been interdicted, the court said that the exception made in the law was in favor of minors and interdicted persons and that the breach would not be widened for the purposes of the case then before it, so as to include an imbecile who was not interdicted.

Plaintiff does not allege why her suit for damages was not filed within one year after the commission of the tort complained of, or why domiciliary service was not made on defendant for more than five years thereafter.

The exceptions filed by defendant were properly sustained.

The judgment appealed from is affirmed at plaintiff's costs.

O'NIELL, J., concurs in the decree.

(78 South. 594)

No. 22628.

Succession of SAVOIE.

BOAGNI v. BREAUX.

(April 29, 1918.)

*(Syllabus by Editorial Staff.)***BILLS AND NOTES ~~C~~534—ATTORNEY'S FEES—  
NECESSITY FOR SUIT—ADMINISTRATION.**

One mortgage note recited that attorney's fees were to be due on default in payment at maturity in event that note was placed in hands of attorney for collection, or suit was brought thereon, and other notes recited that fees were to be due in event that notes were sued on or placed in the hands of an attorney or collector for collection. The maker died, and the holder, living in a different parish from that where the succession was pending and the administrator resided, wrote the latter demanding payment, and the administrator told him the notes would be paid in due course of administration, and the holder expressed his willingness to wait if the attorney of the succession would give him in a letter the assurance that his rights would be protected, and, the letter not having been received, the holder at the expiration of the time fixed for its furnishing placed the notes in the hands of an attorney. *Held*, that a necessity for suit existed, and attorney's fees were due from the administrator to the holder.

Appeal from Eighteenth Judicial District Court, Parish of Lafayette; William Campbell, Judge.

In the matter of the succession of Azema Savole. Judgment for the administrator, and the opponent, E. M. Boagni, appeals. Judgment set aside, and administrator ordered to amend his tableau by putting the opponent thereon as a creditor for attorney's fees.

Guilbeau & Walker, of Opelousas, for appellant. Mouton & Deballon, of La Fayette, for appellee.

**PROVOSTY, J.** The opponent claims attorney's fees on certain mortgage notes for the capital and interest of which he figures on the administrator's tableau as a creditor. One of the notes recites that the fees are to be due "in the event default is made in the payment of this note at maturity, and it is placed in the hands of an attorney for col-

lection or suit is brought on same." The recital in the others is that the fees are to be due if the note is "sued upon or placed in the hands of an attorney or collector for collection."

A few days after the notes had fallen due, the opponent, holder of them, who lived in a different parish from that where the succession was opened and the administrator resided, wrote to the latter demanding payment. Several weeks later the administrator came to see him and told him that the mortgaged property was advertised for sale for the settlement of the succession, and that the notes would be paid in due course of administration. Opponent expressed his willingness to wait, provided the attorney of the succession would in a letter give him the assurance that his rights would be protected. This letter not having been received, the opponent, at the expiration of the time fixed for the furnishing of it—one week—placed the notes in the hands of an attorney.

The ground for resisting the payment of the fees is that the notes were going to be paid in due course of administration, and that therefore there was no necessity for placing them in the hands of an attorney. And the cases of Successions of Burke, 107 La. 85, 31 South. 391, Succession of Howell, 121 La. 960, 46 South. 933, and Succession of Foster, 51 La. Ann. 1670, 26 South. 568, respectively, are cited where the condition in the contract, either in express terms or by necessary implication, required that there should be a necessity for suit, and the court held that such necessity had not been shown.

Even if the condition expressed in said notes was the same as that in these cases, so as to either express or imply that a necessity for suit should exist in order that the fees should be due (a point not necessary to be considered, and which therefore we do not consider), we think that, under the circumstances hereinabove stated, such necessity existed.



The judgment appealed from is set aside, and the administrator is ordered to amend his tableau by putting the opponent thereon as a creditor for these attorney's fees, all costs to be paid by the succession.

(78 South. 594)

No. 22551.

HAVA v. CHAVIGNY.

(April 29, 1918.)

(Syllabus by the Court.)

1. DIVORCE  $\S$  13—SEPARATION FROM BED AND BOARD—CONSTRUCTION OF STATUTE.

Act No. 269 of 1916,  $\S$  1, allowing a divorce to married persons who have been living separate and apart for a period of seven years or more, refers to those "who have been living \* \* \* apart for a period of seven years or more," regardless of the date of the passage and promulgation of the act.

2. DIVORCE  $\S$  93(4)—SEPARATION—CAUSE OF ACTION.

The act, having imposed no conditions with respect to its enforcement other than that the parties "have been living \* \* \* apart for a period of seven years or more" (section 1), it is not necessary for any other condition to be alleged in plaintiff's petition to sustain a cause of action.

3. CONSTITUTIONAL LAW  $\S$  96, 153, 190—EX POST FACTO LAW—OBLIGATION OF CONTRACT—VESTED RIGHTS.

Act No. 269 of 1916 is not an ex post facto law; it does not impair the obligations of the contract of marriage; and it does not divest vested rights.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Suit for divorce by Adrian Hava against Mrs. Marie Ernestine Chavigny. Exception of no cause of action sustained, and plaintiff appeals. Judgment reversed, and suit remanded to district court.

W. O. Hart, of New Orleans, for appellant. Charles Louque, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff sues his wife for a divorce on the ground that they

have lived separate and apart for more than seven years, as provided for in Act No. 269 of 1916, p. 557.

Defendant filed an exception of no cause of action, which was sustained. Plaintiff has appealed.

Act No. 269 is entitled "An act to allow a divorce to married persons who have been living separate and apart for a period of seven years or more"; and it provides in section 1:

"That when married persons have been living separate and apart for a period of seven years or more, either party to the marriage contract may sue, in the courts of the state of his or her residence, provided such residence shall have been continuous for the period of seven years, for an absolute divorce, which shall be granted on proof of the continuous living separate and apart of the spouses during said period of seven years or more."

Section 2 repeals all laws, or parts of laws, contrary to or inconsistent with or in conflict with the act; and section 3 provides that this law shall take effect according to law.

[1] It is argued, in support of the exception, that the act refers only to the future, and that it is not retrospective in its effect in any degree, and that it does not cover married persons who have been living separate and apart for a period of seven years or more before the date of the passage of the act. This same point was presented and ruled upon adversely in the case of *Hurry v. Hurry*, 141 La. 954, 76 South. 160.

The act provides that a suit may be instituted, of course, after the passage of the act, for divorce on the ground stated in the act. It does not attempt to provide for a suit instituted before its passage; and this suit was instituted after the passage of the act. The act is not retrospective in that respect.

It was held in the *Hurry Case* that the language of the act is clear and unambiguous, and it must be given effect to. The act (section 1) provides:

"That when married persons have been living separate and apart for a period of seven years

or more, either party to the marriage contract may sue \* \* \* for an absolute divorce," etc.

Plaintiff, having alleged in his petition that he and his wife "had been living separate and apart for a period of seven years or more" prior to the date of the filing of the suit, under that act, shows a cause of action for a divorce.

Act No. 269 contains an additional ground for divorce to those mentioned in the articles of the Civil Code, and the amendments thereof; and it does not provide that the seven years or more during which the married persons have been living separate and apart should be subsequent to the adoption of the act. On the contrary, it provides that "when married persons have been living separate and apart for a period of seven years or more," either party may sue for a divorce.

[2] In his reasons for sustaining the exception of no cause of action, the judge says that there is no allegation in the petition that plaintiff was without fault, and that he has performed, or been ready to perform, his duties under the marriage contract. But this allegation is not mentioned in Act No. 269. The act imposes no other conditions with respect to its enforcement than that the parties shall "have been living separate and apart for a period of seven years or more." The allegation that he was without fault was therefore unnecessary to support the cause of action in this case. *Raymond v. Carrano*, 112 La. 869, 36 South. 787.

[3] In a supplemental brief, defendant shifts her ground, and says:

"We filed an exception of no cause of action, which was leveled tacitly at the constitutionality of the act."

Defendant quotes article 166 of the Constitution to the effect:

"No ex post facto law, or any law impairing the obligations of contracts, shall be passed, or vested rights be divested," etc.

Act No. 269 is not a criminal statute; it is not an ex post facto law; and it does not impair the obligation of any contract. It provides for a dissolution of the contract of marriage after such contract has been entered into for a cause arising subsequent to the date of the marriage. But that does not impair the obligations of the parties to the contract. The dissolution of the marriage will operate a dissolution of the community of acquets and gains existing between the spouses, and each one will take his share therein; but there will be no divestiture of defendant's rights by the dissolution of the community. She will take her share therein. The act is constitutional.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoïded, and reversed; and it is now ordered that this suit be remanded to the district court, to be there proceeded with in accordance with law.

(78 South. 596)

No. 22434.

BOYER v. CRESCENT PAPER BOX FACTORY, Inc.

(Nov. 26, 1917. On Rehearing, April 29, 1918.)

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT ~~§~~359 — EMPLOYERS' LIABILITY ACT—APPLICATION—NOTICE.

Employers' Liability Act (Act No. 20 of 1914) § 3, par. 3, providing that parties to the contracts of employment covered by the act shall be presumed to have intended to be subject to its provisions, unless otherwise stipulated in the contract, or unless either party gives the other notice to the contrary not less than 30 days prior to the accident, applies where an injured employé gave notice only after the accident, but within 30 days of the date of employment.

2. MASTER AND SERVANT ~~§~~393½—EMPLOYERS' LIABILITY ACT—APPLICATION.

Where an employer fully complied with the medical aid requirements of the Employers' Liability Act (Act No. 20 of 1914), § 8, par. 5, during the first two weeks after the injury, it was not estopped from invoking the benefits of the act.

**3. MASTER AND SERVANT §398—EMPLOYERS' LIABILITY ACT—NOTICES.**

The only function of Employers' Liability Act (Act No. 20 of 1914) § 12, relating to the posting of notices as to the time for notice of injury, and as to effect of failure to post notices, is to stay the running of the 15 days allowed for notice of injury, and the only consequences of a failure to post such notices is that the employé, under section 11, has 6 months instead of 15 days within which to give notice.

**4. MASTER AND SERVANT §347—EMPLOYERS' LIABILITY ACT—CONSTITUTIONALITY.**

The Employers' Liability Act (Act No. 20 of 1914) is not invalid as making the employé, without his consent, a party in a contract entered into by the employer with an insurance company, as the employé is not made a party to such contract, but is merely given a right of action thereon for his additional security, and as under the express provision of section 41 the nullity of such provision would not entail the nullity of the entire act.

**5. MASTER AND SERVANT §347—EMPLOYERS' LIABILITY ACT.**

Employers' Liability Act (Act No. 20 of 1914) § 3, par. 3, providing that every contract of the kind covered by the act is presumed to have been intended to come thereunder, unless express provision is made to the contrary in the contract, or a notice of a contrary intention is given by the employé to the employer 30 days before the accident, is not beyond the legislative authority as a prescription established in the interest of foreign insurance companies, as the function of the notice is not to cut off a right of action by prescription, but to take the employment contract from under the operation of the act.

**6. MASTER AND SERVANT §347—EMPLOYERS' LIABILITY ACT—RIGHT OF ACTION—NOTICE.**

The power of the Legislature to provide, as in Employers' Liability Act (Act No. 20 of 1914) § 3, par. 3, that an employé in a factory shall have no right of action for personal injury in the course of his employment, unless he gives the employer notice of the injury within reasonable time after its occurrence, cannot be doubted.

**7. STATUTES §114(2)—SUBJECT AND TITLE—CONSTITUTIONAL PROVISIONS.**

The Employers' Liability Act (Act No. 20 of 1914), prescribing employers' liability for injuries to employés, the compensation and procedure, etc., expresses the object in its title, to which object everything contained in the act is germane, and hence is not unconstitutional because containing more than one object, and because several objects contained therein are not expressed in its title.

**8. MASTER AND SERVANT §347—EMPLOYERS' LIABILITY ACT—RIGHTS OF ACTION—CONSTITUTIONALITY.**

Employers' Liability Act (Act No. 20 of 1914) is not unconstitutional because taking

away an employé's right of action under the general law of torts.

Monroe, C. J., dissenting.

**On Rehearing.**

*(Syllabus by the Court.)*

**9. MASTER AND SERVANT §385(11)—EMPLOYERS' LIABILITY ACT—CONSTRUCTION.**

Act No. 20 of 1914, p. 44, known as the Employers' Liability Act, or Compensation Act, does not provide for serious permanent injuries which result in disfigurement about the face or head, or to the destruction of the usefulness or the impairment of a member or any physical function of the body.

**10. AMENDMENT TO EMPLOYERS' LIABILITY ACT.**

The said act has been amended so as to cover such cases by Act No. 243 of 1916, p. 512.

**11. MASTER AND SERVANT §349—PERSONAL INJURY—RECOVERY OF DAMAGES—INJURY TO SCALP.**

The scalping of an employé, which occurred while performing services arising out of and incidental to his employment in the course of his employer's business, prior to the amendment of the statute, entitles him to damages, and not to compensation under the Employers' Liability Act.

Provosty, J., dissenting. O'Niell, J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Miss Effie Boyer against the Crescent Paper Box Factory, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Gordon Boswell and L. P. Bryant, Jr., both of New Orleans, for appellant. George Sladovich and Henry J. Rhodes, both of New Orleans, for appellee.

PROVOSTY, J. While plaintiff was in the dressing room of the defendant's factory getting ready to go home after her day's work, her hair got caught in some machinery, and she was scalped. There can be no serious question but that she would be entitled to heavy damages were it not for Act 20, p. 44, of 1914, known as the Employers' Liability Act. She denies that her case comes under this act; and, in the event

that it does, she contends that the act is unconstitutional.

[1] Her reasons for saying that the act does not apply to her case are:

First. That she gave defendant the notice provided for by paragraph 3 of section 8 of said act.

That section provides that the parties to the contracts of employment covered by the act shall be presumed to have intended that their contract should be subject to the provisions of the act, unless otherwise stipulated in the contract, or unless either party gives to the other notice to the contrary, "not less than thirty days prior to the accident."

Plaintiff gave this notice only after the accident, but within 30 days of the date of her employment; and the argument is that she had 30 days within which to give the notice. The act does not so provide. It is explicit to the contrary. By its operation every contract is included, unless taken out either by express stipulation in the contract itself, or by notice 30 days before the accident. Needless to consider what would have been the legal situation if the notice had been given as soon as it was possible to give it, but less than thirty days before the accident.

[2] Second. That defendant refused to furnish her the medical aid required by paragraph 5 of section 8 of the act to be furnished by the employer to the injured employé "during the first two weeks after the injury," and is therefore not in a position to invoke the benefit of the act.

There is no evidence of defendant's having failed to furnish this medical aid. One of the exhibits attached to plaintiff's petition is a letter, alleged to be from defendant's counsel, bearing upon this question of medical aid; but this letter was not offered in evidence, and if, in evidence, would show that defendant complied fully with the medical aid requirement. It is dated December

8, 1915, is addressed to plaintiff's counsel, and reads:

"Dear Sir:

"Re Miss Effie Boyer v. Crescent Paper Box Factory, Inc.

"Crescent Paper Box Factory, Inc., has referred to me for attention your communication of Dec. 2d and 6th, relative to accidental injuries sustained by your client, Nov. 13th, while in its employ.

"As you know, Act No. 20 of 1914 imposes upon my client certain obligations and liabilities from which it cannot escape, and it is our intention to comply to the letter with the requirements of the said act.

"Directly after the accident, and in order to alleviate, as much as possible, the pain and suffering of Miss Boyer, we had her removed from the Charity Hospital to the Touro Infirmary, and placed under the treatment of our own surgeon, Dr. J. Barnett. However, in view of her attitude, as expressed in your communication, we felt that it is not incumbent upon us to incur further expenses in her behalf, and have therefore notified Dr. Barnett and the Touro Infirmary that we will not be responsible for any further expenses in the nature of medical attention, medicine, or hospital fees. As attorney at law and in fact for Miss Boyer we hereby notify you, with the request that immediate arrangements be made for the rendering of further attention at the expense of Miss Boyer.

"Allow me to emphatically deny the statement of Miss Boyer that any one representing her employer has called upon her to annoy her with any proposal to effect an amicable settlement. Such a statement is without foundation in fact.

"If there are any features of the case which you wish to discuss with me kindly advise me and it will afford me pleasure to call upon you.

"Very truly yours."

Defendant appears by this letter to have furnished medical assistance from November 13th to, at least, December 8th—more than two weeks.

[3] Third. That the defendant has not posted a notice in its factory as required by said Act No. 20 of 1914.

The notice here referred to as required to be posted is that provided for by section 12 of the act, reading as follows:

"Sec. 12. Be it further enacted, etc., that it shall be the duty of the employer to cause to have printed and to keep posted at some convenient and conspicuous point about the place of business a notice reading \* \* \* as follows: 'In case of accidental injury or death the injured employé or some one acting in his behalf, must give notice to [here shall follow the name

and address of the party] within fifteen days, and unless notice be given to the above party within fifteen days, no payments will be made under the law for such injury or death.' In the event of the failure of the employer to keep posted said notice, the time in which notice of the injury shall be given as provided in section 11 shall be extended to six months from the date of injury."

Evidently the only function, or effect, of said notice is to start the running of the 15-day delay within which an injured employé must give notice of his injury; and the only consequence of failure to give this notice is that the employé has 6 months, instead of 15 days, within which to give notice of his injury.

Fourth. That the loss of a scalp is not mentioned among the special cases of loss for which provision is made in said act, and that therefore any injury of that kind does not come under the act.

Section 8 of the act provides, in general terms, "for injury producing (a) temporary total disability to do work of any reasonable character; (b) temporary partial disability; (c) permanent partial disability; and (d) permanent total disability." Under the (c) subdivision it provides a schedule of compensation for special cases according to the member or part of the body that has been lost. Because the scalp is not mentioned among the parts of the body thus specially provided for, the contention is made by plaintiff that an injury consisting in the loss of the scalp does not come under the act.

We find no force in this contention. Section 1 of the act provides that this act shall apply to "every person performing services arising out of and incidental to his employment in the course of his employer's trade, business," etc.; and then section 8 provides for temporary total disability to work. Plaintiff's case falls squarely within this classification; she was temporarily disabled totally from doing work of any reasonable character.

Plaintiff calls attention to the fact that by Act No. 243 of 1916, p. 512, the said Act No. 20 of 1914, § 8, was amended so as to make special provision for the case where "the employé is seriously permanently disfigured about the face or head." But we do not see in what way this amendment changes the situation, in so far as the present case is concerned. It merely adds disfigurement to the injuries for which special provision is made for compensation.

Plaintiff's next contention is that the right of action prescribed by said act is not exclusive of a right under the general law of torts. But section 34 of said act is expressly and explicitly to the contrary of this contention.

[4] The next contention is that the said act is null because by it the employé, without his or her consent, is made a party to any contract the employer may enter into with an insurance company to cover the latter's liability in the premises.

The answer is twofold: (1) That the employé is not made a party to such contract, but is merely given a right of action upon it for his additional security; and (2) that the nullity of this provision would not entail the nullity of the entire act, since, by section 41 of the act, it is provided that "if any provision of this act shall be declared unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the validity of any other portion thereof which can be given reasonable effect without the provision so declared unconstitutional or invalid."

[5, 6] Next, it is contended that the provision by which every contract of the kind covered by the act is presumed to have been intended to come under the act, unless express provision is made to the contrary in the contract, or notice of a contrary intention is given by the employé to the employer 30 days before the accident, is a prescription

established in the interest of foreign insurance companies, which the Legislature was without authority to adopt.

In the first place, as already stated, the function of the 30-day notice here in question is not to cut off, by prescription or otherwise, a right of action, but is to take the employment contract from under the operation of the said act; and, in the second place, the power of the Legislature to provide that an employé in a factory shall have no right of action for personal injury suffered in the course of his employment, unless he gives the employer notice of the injury within a reasonable time after its occurrence cannot be doubted.

[7] Coming to the question of constitutionality, the grounds of unconstitutionality are not stated with definiteness either in the pleadings or in the briefs. As we understand them, they are that the act is unconstitutional, first, because of the several provisions therein contained relative to the insurance which the employer may take for his protection; (2) because it contains more than one object, and that the several objects which it contains are not expressed in its title; and (3) because it deprives the employé of his life and liberty by taking away from him his right of action under the general law of torts, and confining him to the remedy prescribed by the act.

The first of these objections has already been answered; these provisions relative to insurance take away nothing from the employé; their sole operation in so far as he is concerned is to give him a right of action against the insurance company in which the employer may insure himself against liability under the act, this right of action being additional to that against the employer.

As to plurality of objects and nonexpression in title, we find that the act has but one object; it is an employers' liability act. And we find that everything contained in the act

is germane to that object, and that that object is expressed in the title of the act, except perhaps as to that part of section 37 making it a criminal offense to make a false statement or representation, etc. But with said section 37 the plaintiff has no concern; and the nullity of that section would not entail the nullity of the rest of the act.

[8] As to the act being unconstitutional because taking away plaintiff's right of action under the general law of torts, see *N. Y. Central R. R. Co. v. Sarah White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, *L. R. A. 1917D, 1, Ann. Cas. 1917D, 629*, and other *Workmen's Compensation Cases, Lawyers' Co-op.*, where this question is fully discussed, and decided adversely to plaintiff's present contention.

If, as alleged in the answer, and as stated in the letter of defendant's counsel hereinabove transcribed, the defendant company has been willing and ready all along to comply with its obligations under said Act No. 20 of 1914, the plaintiff's suit will have to be dismissed at her cost. The case was not tried as one under said act, as should have been done; hence it will have to be remanded for further trial.

The judgment appealed from is therefore set aside, and the case is remanded to be tried in accordance with the views expressed in this opinion.

MONROE, C. J., dissents. LECHE, J., takes no part.

#### On Rehearing.

SOMMERVILLE, J. Further consideration has led to the conclusion that plaintiff's suit in damages must be sustained, and that the case is not controlled by or provided for in the *Employers' Liability Act, No. 20 of 1914, p. 44*.

Defendant excepted to the action for damages, and denied liability for compensation.

The law guarantees life, liberty, and property to every person, and provides courts wherein one may have adequate remedy for injury done him in his rights, lands, goods, person, and reputation; and it obliges him, through whose fault an injury happens to another, to repair it.

The Employers' Liability Act does not provide for compensation for the injury sustained by plaintiff.

Plaintiff was engaged, with a large number of other hands, in the factory of the defendant company, where she met with the frightful accident which injured and damaged her so disastrously. While in the dressing room of the defendant company, where she had a right to be, her entire scalp was taken from her head by her hair being caught in a revolving belt, which was not shielded. It was negligence on the part of the defendant to have such a belt in operation at that place without safeguarding it. Plaintiff's scalp was taken off more completely and entirely than was customarily done by the savage Indian tribes which, with a scalping knife, scalped their victims, dead or alive, and carried the scalps as trophies, and as evidences of their conquests. She has not, and never will have, a hair on her head. Plaintiff asked for judgment in the sum of \$10,000 actual damages, and \$2,500 exemplary damages. The trial judge gave judgment for the amount claimed for actual damages, and rejected the claim for exemplary damages. Exemplary damages cannot be allowed.

[8] The Employers' Liability Act, recently adopted in 1914, giving compensation to the injured employé instead of the action for damages which was his exclusive remedy theretofore for personal injuries, is not clear from difficulties in its interpretation. It may have been taken from compensation acts of different states, and that may have led to some confusion in the act. Its terms would import that it was both a compulsory and a voluntary law at the same time. These

terms will have to be construed with reference to these two forms of the act, and application will be made in cases presenting these points so as to give all the provisions proper effect.

The act, before it was amended, strictly provided for compensation for personal injuries suffered by the employé while in the performance of services arising out of and incidental to his employment by compensating him for loss of earning power. The act makes the loss of earning power alone the sole basis for compensation.

It may be assumed for the purposes of this case that Effie Boyer is a person described in the Compensation Act, and that the contract she entered into with her employer carried with it the presumed election on her part to work under the provisions of that act; but the act does not provide compensation for the personal injury suffered by her through the fault of the defendant.

Effie Boyer suffered personal injuries in the course of her employment under defendant which has not in any manner destroyed, in whole or in part, her earning power. Her injury is grievous, but it has not deprived her of any of the means of earning wages; and the act as it originally was made no provision for such injury and damage.

[10, 11] Indeed, the Legislature itself has declared in amending Act No. 20 of 1914, § 8, in Act No. 243 of 1916, § 1, p. 514, that there were cases which did not fall "within any of the provisions already made" in the original act. Act No. 20, it may be noted parenthetically, is no longer a purely compensation act. By the amendment just referred to, the act is made to embrace personal injuries which do not affect the earning power of the employé. In section 8, subd. (d), of that act (as amended), it is provided:

"In cases not falling within any of the provisions already made, where the employé is se-

riously permanently disfigured about the face or head or where the usefulness of a member or any physical function is seriously permanently impaired, the court of proper jurisdiction as hereinafter provided may allow such compensation as is reasonable in proportion to the compensation hereinabove specifically provided in the cases of specific disabilities above named, not to exceed fifty per centum of wages during one hundred weeks."

The amendment may include the personal injury to plaintiff, but it was adopted subsequent to the time of the accident, and it is therefore without application here. The injury to Effie Boyer may have caused the adoption of the amendment.

The original act provides compensation for "every injury producing temporary total disability to do work of any reasonable character," for "injuries producing temporary partial disability," and for "every injury producing permanent partial disability," in section 8. We repeat that only those personal injuries resulting in disability "to do work of any reasonable character" are covered by the act. And those disabilities are enumerated, such as the loss of a thumb, finger, arm, etc., which may disable an employé to do work; in other words, those injuries which impair the earning power of the employé.

Effie Boyer may be said to have sustained a personal injury "producing temporary total disability to do work" while she was in the hospital undergoing medical treatment after the accident to her. But she has sustained greater injury than a temporary disability. She has been deprived of her scalp. Such a condition cannot be termed a temporary disability, or a "disease or infection naturally resulting from the injury." She is not "entitled to compensation under this act" for the injury which she has sustained and which she now bears. Her right to damages, or to compensation, is not provided for in the act. The act only restricts the rights and remedies to those employed under the act, where it provides that compensation shall be made for personal injuries which

affect the earning power of the employé. Section 34 says:

"That the rights and remedies herein granted to an employé on account of a personal injury for which he is entitled to compensation under this act, shall be exclusive of all other rights and remedies of such employé, his personal representatives, dependents, relations, or otherwise, on account of such injury."

The Compensation Act did not provide for compensation for the injury suffered by plaintiff, and she is not therefore entitled to compensation under that act. Her right to damages is not attempted to be excluded by the act. The rights and remedies given in the act are declared to be for a "personal injury for which he [she] is entitled to compensation under this act."

The claim of plaintiff not being embraced within the terms of or governed by the Employers' Liability Act was properly made under article 2315, C. C.

The judgment appealed from is affirmed.

MONROE, C. J., concurs in the decree.

LECHE, J., concurs in the decree.

PROVOSTY, J., dissents and hands down reasons. See 78 South. 600.

O'NIELL, J., is of the opinion that, unless the decision rendered in the case of *Woodruff v. Producers' Oil Co.*, 142 La. 363, 76 South. 803, holding that the Employers' Liability Act does not apply to an injury that occurred within 30 days after the employment, should be overruled, the question whether the statute excludes an action for damages under article 2315 of the Civil Code, for such an injury as Effie Boyer suffered, should not be considered, because the injury she suffered occurred within 30 days after she was employed. He is of the opinion that the reasons given for the ruling in the case of *Woodruff v. Producers' Oil Co.* are not tenable; that the ruling cannot be reconciled with that rendered originally in the present case and should be overruled.



(78 South. 601)

No. 23036.

## STATE v. LANKFORD.

(April 29, 1918.)

*(Syllabus by Editorial Staff.)*1. BAIL ~~657~~—APPEARANCE BOND—DATE OF OFFENSE.

Where the affidavit, made April 28, 1917, charged an offense committed on October 23, 1917, and the condition of the appearance bond was to answer an offense committed October 23, 1916, the error in the affidavit was merely clerical, the date therein being an impossible one, and did not relieve the surety, the bond itself supplying its date.

2. BAIL ~~649~~—APPEARANCE BOND — ORDER FIXING AMOUNT.

That the record fails to show any order fixing the amount of appearance bond does not relieve the surety from a forfeiture, where the bond was ordered by justice of the peace, as a justice court, not being a court of record, no proceedings therein need be in writing, and the acceptance of the bond and its transmission to the district court furnished sufficient proof that it was taken by order of the justice of the peace.

Appeal from Fourth Judicial District Court, Parish of Union; Joseph Burrough Crow, Judge.

K. D. Lankford was arrested on a criminal charge, and he gave an appearance bond, and from a judgment forfeiting such bond, C. D. Lankford, surety, appeals. Affirmed.

J. W. Elder and H. G. Fields, both of Farmersville, for appellant. A. V. Coco, Atty. Gen., and H. B. Warren, Dist. Atty., of Ruston (Vernon A. Coco, of New Orleans, of counsel), for the State.

LECHE, J. C. D. Lankford, surety on an appearance bond, furnished by K. D. Lankford, appeals from a judgment forfeiting said bond.

An affidavit was made April 28, 1917, before J. W. Brown, justice of the peace for the Third ward of the parish of Union, by May Williamson, charging K. D. Lankford with having on the 23d day of October, 1917,

had carnal knowledge of her, the affiant, a female between the ages of 12 and 18 years.

The accused was arrested, and on May 5, 1917, in said justice of the peace court, furnished bond in the sum of \$300, with C. D. Lankford as surety, conditioned for his appearance before the Fourth judicial district court for the parish of Union, to answer the said charge of having on the 23d day of October, 1916, had carnal knowledge, etc.

The accused was accordingly indicted by the grand jury for the parish of Union on the 21st day of September, 1917. Failing to appear in the district court when called, the bond was regularly forfeited on October 15, 1917, and judgment of forfeiture was signed on the 17th, two days thereafter.

The present appeal is taken from said judgment, and appellant relies for a reversal of said judgment on two grounds:

(1) That the condition of the bond is to appear in order to answer an offense committed on October 23, 1916, whereas the affidavit charges an offense committed on October 23, 1917.

(2) That the record fails to show any order of court fixing the amount of said bond.

## Opinion.

[1] Appellant's first objection is based upon an error which is clearly of a clerical nature. The affidavit was made April 28, 1917, and therefore the offense charged must of necessity have been committed before that date. The bond itself supplies the date. An incorrect or insufficient description of the offense in an appearance bond does not relieve the surety. *State v. Reames*, 136 La. 48, 66 South. 393. A fortiori will a correct description as to date, when the date in an affidavit is an impossible one, not relieve the surety.

[2] Appellant's second objection would be well taken if the bond had been furnished in a proceeding before the district court, but it

was ordered and taken in a justice of the peace court before the justice of the peace himself, and there is no law requiring a written order under such circumstances. A justice of the peace court is not a court of record, and no proceeding before that court need be written, unless specially provided by law. The acceptance of the bond by that court and its transmission to the district court furnishes sufficient proof that it was taken by order of the justice of the peace. *State v. Hendricks*, 40 La. Ann. 724, 5 South. 24, 177.

The judgment appealed from is affirmed.

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(78 South. 601)

No. 22582.

MEYERS et ux. v. BASCLE.

(April 29, 1918.)

(*Syllabus by the Court.*)

MASTER AND SERVANT §—153(1)—NEGLIGENCE  
—FAILURE TO WARN INEXPERIENCED SERV-  
ANT.

"It is actionable negligence for a master not to warn an inexperienced servant of the dangers of the employment, and instruct him how to avoid them."

Appeal from Twenty-Sixth Judicial District Court, Parish of Saint Tammany; Prentiss B. Carter, Judge.

Action by Mr. and Mrs. Seymore Meyers against Joseph A. Bascle. Judgment for plaintiffs, and defendant appeals. Affirmed.

Harvey E. Ellis, of Covington, for appellant. Fred J. Heintz and Adrain D. Schwartz, both of Covington, for appellees.

SOMMERVILLE, J. Plaintiffs, on behalf of their minor son, aged 17 years, sued defendant in damages for personal injuries to their said son, alleged to have been suffered while in the employ of defendant through the fault and negligence of the defendant.

Defendant answered denying his liability,

and alleged gross fault and negligence on the part of plaintiff's son.

There was judgment in favor of plaintiffs for \$1,000, and defendant has appealed.

Plaintiffs allege in their petition that their son, Joseph W., was an immature youth, reared in the country, and not accustomed to the use of machinery, and that in placing him with the defendant to work on defendant's farm, and in his dairy, it was stipulated that their son was not to use the hay-cutter belonging to defendant; that their son was put to work thereat by defendant, contrary to the stipulation made by them with him; and that he was not warned or given knowledge of the dangerous character of the machine where he had been put to work by defendant, and that he was maimed by said machine.

Defendant answering did not deny that plaintiff's son had been put to work at the hay-cutter by him without the giving of instructions by him as to the dangerous character of the machine, and he alleged that no instructions were necessary to be given any one in the use of the same, as it was not a dangerous machine.

The evidence shows that Joseph Meyers was an ordinary country lad, uninstructed as to machinery and the dangers attending its use, and that he was feeding the hay-cutter when he met with the accident which resulted in the cutting off of his thumb and two first fingers, together with the first joint of the third finger of his right hand. It further shows that the cutters of the machine which maimed the right hand of the boy were concealed by a hood, and that the machine was not ordinarily dangerous to one who had been instructed in the use thereof.

It appears on the occasion of the accident that Joseph had been feeding the machine with his right hand, and that the machine had become choked, and to unchoke it he

placed his left hand in front of the machine to pull the hay out, when his right hand was drawn by the rollers with the pea vines into the cutters. It further appears that the proper way for him to have done to unchoke the machine was to go in front of it and pull the hay out with his hands, or with a stick, after the gasoline engine which operated the cutter had been stopped. The machine might have been unchoked by a lever, which was attached to it for that purpose, but the operator did not know anything about the lever, and he proceeded to act in the way that he had seen others act.

That the machine was dangerous to an inexperienced hand is shown by the results to Joseph Meyers in this case, and it was the duty of the master to have acquainted him with its risks and dangers at the time of his employment, and to have shown him how to operate the lever in the event the machine became choked.

"An inexperienced employ  should not be sent to do work where there is danger without instructions enabling him to guard against danger." *Bonnin v. Crowley*, 112 La. 1025, 36 South. 842.

Where the master fails to instruct an inexperienced servant, and in consequence of which failure the servant is injured, the master does not discharge his full duty to his servant. *McBailey v. Subervielle*, 120 La. 570, 45 South. 442; *Parker v. Lumber Co.*, 115 La. 463, 39 South. 445.

Indeed, it appears to us that a master who sends an inexperienced man to work in the presence of known danger without warning him of the danger, and without trying fully to instruct him how to avoid the danger is woefully remiss in his duty. He ought not, in the first place, to employ an inexperienced man to do a dangerous piece of work requiring more skill than the employ  possesses. But as industrial enterprises must go on, and men must find employment,

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at least he should be held to a strict compliance with the rule, and give to each inexperienced man full instructions of the danger to which he is to be exposed. *Lindsay v. Lumber Co.*, 108 La. 468, 32 South. 464, 92 Am. St. Rep. 384.

The judge allowed damages in the sum of \$1,000. Plaintiffs have not answered the appeal.

The judgment appealed from is affirmed.

O'NIELL, J., concurs in the decree.

(78 South. 602)

No. 22864.

MAHER v. LOUISIANA RY. & NAV. CO.

(April 29, 1918.)

(Syllabus by Editorial Staff.)

1. RAILROADS  324(1)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

One run down by a railroad train on a street crossing is not necessarily at fault, but only so if he contributed to the event by his negligence.

2. RAILROADS  344(8)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN TO PLEAD.

In an action against a railroad for injuries at a crossing, the burden of pleading contributory negligence is on the railroad.

3. RAILROADS  344(8)—INJURIES AT CROSSING—PLEADING—ABSENCE OF DESIGN.

In an action for injuries at a railroad crossing, the petition should show absence of design on the part of the injured person to bring about the accident, which is done by the allegation that he was in no wise at fault.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Suit by George Osmond Maher against the Louisiana Railway & Navigation Company. From judgment of dismissal, plaintiff appeals. Judgment set aside, and case remanded to be proceeded with according to law.

Leslie A. Fitch, of Baton Rouge, for appellant. Laycock & Beale, of Baton Rouge, and

Wise, Randolph, Rendall & Freyer, of Shreveport, for appellee.

**PROVOSTY, J.** The plaintiff alleges that while he was walking across the tracks of the defendant company's railroad in the city of Baton Rouge he was knocked down without any fault of his own by a train of the defendant, as the result of no lookout having been kept by the crew of the train and of absence of all warning, either by sound or light, of the approach of the train.

An exception of no cause of action was sustained, and the suit dismissed.

[1-3] A cause of action is shown, we think. A man who is run down by a train upon a street crossing is not necessarily at fault. He is so only if he has contributed to the event by his negligence; and the burden of pleading contributory negligence is on the defendant, not on plaintiff. True, the petition in such a case should show absence of design on the part of plaintiff to bring about the accident, but this is shown in this case by the allegation that plaintiff was in no wise at fault.

The judgment appealed from is set aside, and the case is remanded to be proceeded with according to law.

(78 South. 603)

No. 23011.

STATE v. HARRISON.

(April 29, 1918.)

(Syllabus by Editorial Staff.)

1. JURY  $\S$  79(1)—DRAWING NAMES—RESTORATION ON RECESS.

Where five names were successively drawn from the venire box, and the five jurors successively called, but they failed to appear, and the judge recessed over to the afternoon, the names which had been taken out of the box had to be restored.

2. CRIMINAL LAW  $\S$  918(10, 11)—DRAWING JURY—FAILURE TO PUT BACK NAMES—LATE OBJECTION—NEW TRIAL.

Where, after all the names in the venire box had been drawn, it was discovered that by in-

advertence the names of the jurors who had been serving on other juries in the morning had not been put back into the box, which was immediately done, and the drawing proceeded with, defendant not objecting, his objection in motion for new trial came too late, as he had taken the chance of a favorable verdict.

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

James Harrison was convicted of carnal knowledge of an unmarried woman under 18 with her consent, and he appeals. Affirmed.

S. M. Cagle, of Coushatta, for appellant. A. V. Coco, Atty. Gen., and J. F. Stephens, Dist. Atty., of Coushatta (Vernon A. Coco, of New Orleans, of counsel), for the State.

**PROVOSTY, J.** Convicted of carnal knowledge of an unmarried woman under the age of 18 with her consent, the accused has appealed.

When his case was called for trial at 11 o'clock a. m., no jurors were at hand. Some were serving on two juries already impaneled, and the rest had been excused until 1 o'clock. Although, because of the absence of the jurors, defendant objected to going to trial, the judge required the case to be proceeded with. But after five names had been successively drawn from the venire box, and the five jurors successively called and failed to appear, the judge recessed over to 1 o'clock. Defendant then objected to the names which had been drawn from the venire box at 11 o'clock being put back therein.

[1] As the trial was not proceeded with at 11 o'clock, no harm was done defendant then; and, as a matter of course, the names which had then been taken out of the box had to be restored.

[2] After all the names in the venire box had been drawn, the discovery was made that, by inadvertence, the names of the jurors who had been serving on the two juries in the morning had not been put back into the box. This, however, was immediately

done, and the drawing proceeded with, without objection on the part of accused. What would have been the legal situation, if objection had then and there been made, need not be considered, since, after accused had taken the chances of a favorable verdict, it was too late for him to make the objection, as he did by motion for new trial. *Marr*, Crim. Juris. 826.

Judgment affirmed.

(78 South. 650)

No. 22772.

TREMONT LUMBER CO. v. MAY, Assessor,  
et al.

(Jan. 3, 1918. On Rehearing, April 29, 1918.)

(Syllabus by Editorial Staff.)

1. PLEADING  $\S$  32—INCORPORATION OF DOCUMENTS—REFERENCE.

In the Louisiana system of pleading a petition may be composed in part of documents annexed to it and alleged to be made part of it, and their recitals are considered as made in the petition, if the documents are actually made part of or incorporated into the petition, which is not the case where they are merely referred to, as their contents are not then communicated to the court and the adversary party.

2. PLEADING  $\S$  243—AMENDMENT—INSUFFICIENT PETITION.

A petition which does not show a cause of action is one on which no judgment can be pronounced, and is, legally speaking, no petition, and hence cannot be amended.

3. PLEADING  $\S$  279(1)—SUPPLEMENTAL PETITION—BEGINNING SUIT BY FILING.

Where a cause of action is stated for the first time in a supplemental or amended petition, the filing of the supplemental petition must be considered to be the beginning of the suit, and such supplemental petition must be served on the defendant, and delays for answering allowed as in case of an original petition.

4. INJUNCTION  $\S$  163(1)—DISSOLUTION—INSUFFICIENCY OF BOND.

In an action to contest an assessment, where the contestant's bond is insufficient in amount, injunction must be dissolved.

5. TAXATION  $\S$  609—CONTEST OF ASSESSMENT—INJUNCTION.

Injunction against collection of taxes being merely ancillary to the Louisiana suit to contest

the assessment, there is no ground for injunction when the suit to contest has not been filed in time.

6. TAXATION  $\S$  610—CONTEST OF ASSESSMENT—INJUNCTION—PAYMENT OF UNCONTESTED TAXES.

Under the Revenue Law (Act No. 170 of 1898), there is no ground for injunction against collection of taxes in suit to contest the assessment until the uncontested part of the taxes has been paid and the collector's receipt produced.

7. TAXATION  $\S$  610—CONTEST OF ASSESSMENT—INJUNCTION—TENDER OF UNCONTESTED TAXES.

Where a lumber company contesting an assessment tendered the amount of taxes not contested by it on condition that a receipt in full be given, such tender was a pretense, and futile to give the company a right to injunction against collection of taxes in its suit contesting the assessment.

8. INJUNCTION  $\S$  148(1)—INSUFFICIENCY OF BOND.

Where the insufficiency of the bond given by the owner of property contesting an assessment thereof is not shown to have been the result of error or omission, Act No. 112, of 1916, allowing a litigant to furnish a new bond when the one furnished is insufficient in amount or incorrect by reason of error or omission, has no application.

9. TAXATION  $\S$  609—CONTEST OF ASSESSMENT—INJUNCTION AGAINST SALE—RULE NISI.

Under the Revenue Law, § 56, in suit to contest an assessment, injunction against sale of the property was properly dissolved where its issuance was not preceded by a rule nisi.

10. TAXATION  $\S$  611(8)—CONTEST OF ASSESSMENT—PENALTY.

A penalty on the uncontested part of taxes, under the Revenue Law, § 56, requiring that the party contesting an assessment, if defeated, must be condemned to pay, as attorney's fee, 10 per cent. on the amount of taxes, should not be imposed in case of doubt, whether plaintiff made tender of the uncontested part of the taxes unconditionally or conditionally.

O'Niell, J., dissenting.

(Syllabus by the Court.)

On Rehearing.

11. PLEADING  $\S$  48—PETITION—SUFFICIENCY.

A petition may disclose a cause of action, though open to the objection that its allegations are not, in some respects, sufficiently full or specific to furnish the defendant with information to which he is entitled.

# 12. PLEADING $\S$ 307—REFERENCE TO ANNEXED DOCUMENT.

Where a document alleged to be annexed to, and made part of, a petition is not thereto annexed and filed, a court will determine from the allegations of the petition itself whether it discloses a cause of action; but, though it be of opinion that no cause of action is thus disclosed, it may, at any time prior to the maintenance of an exception of no cause of action, allow plaintiff to amend by filing the missing document, or otherwise by supplementing general allegations and supplying omissions therein.

# 13. PLEADING $\S$ 234—ORDER OF AMENDMENT—PERMISSION TO FILE.

Where, in maintaining an exception of vagueness of allegation, a trial court orders a plaintiff to amend his petition, such plaintiff does not require the permission of the court to file a petition complying with its order.

# 14. STATUTES $\S$ 121(6) — TITLE — CONSTITUTION—TAXATION.

The single object of Act No. 170 of 1898 is to obtain a revenue for the state by taxation, and section 56, in making provision against obstructions to its accomplishment by improvident injunctions, is germane to that object, and hence is not repugnant to article 31 of the Constitution, declaring that every act shall have but one object, which shall be expressed in the title.

# 15. PLEADING $\S$ 228 — EXCEPTION—AMENDMENT.

The law requires a suit by a tax debtor, contesting the action of a board of review in raising his assessment, to be instituted prior to November 1st of the year in which the assessment is made, and where a suit making such contest is instituted and the proper parties cited prior to that date, and an exception of no cause of action, leveled against it, is overruled, the fact that, by order of court, maintaining an exception of vagueness, the petition is afterwards amended, affords no ground for maintaining an exception of prescription.

# 16. INJUNCTION $\S$ 148(1)—NEW BOND.

Though by Act No. 112 of 1916 a taxpayer who has enjoined the collection of a tax is allowed two days within which to furnish a new or additional bond, at any time prior to judgment, and after notice of complaint, by the collector, of the insufficiency of the bond furnished, and though he may receive such notice only upon the day upon which the motion to dissolve the injunction is filed and tried, yet if he then fails either to tender a new bond or to claim the delay to which he is entitled, and does not thereafter make such tender, he will be held, on the appeal from the judgment dissolving the injunction, to have lost that privilege.

# 17. TAXATION $\S$ 607—COLLECTION—INJUNCTIONS—STATUTES.

The provisions of the Code of Practice, authorizing and requiring the issuance of injunc-

tions in the cases therein specified, do not control those of the later act, No. 170 of 1898, prohibiting the issuance of injunctions restraining the collection of taxes, save upon the conditions therein prescribed, and repealing all laws in conflict or inconsistent therewith.

# 18. TAXATION $\S$ 609—COLLECTION—INJUNCTION—PAYMENT—RULE NISI.

In order to entitle a tax debtor to an injunction restraining the collection of a portion of the taxes assessed against him, he must show that he has paid the portion admitted to be due, and exhibit and file the receipt therefor. In order to entitle a tax debtor to enjoin the collection of a tax assessed against him, he must proceed against the collector by rule nisi, and obtain the order for the injunction after the hearing of the same.

# 19. INJUNCTION $\S$ 163(2)—DISSOLUTION.

The doctrine, or rule, that a court will not dissolve an injunction if it is apparent that the party in whose favor it was issued would immediately be entitled to another such writ, has no application in cases in which it appears that the party would not immediately, or perhaps not at all, be so entitled.

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

Suit by the Tremont Lumber Company against A. H. May, Assessor, and others. From a judgment dismissing suit and dissolving injunction, plaintiff appeals. Judgment annulled in part, affirmed in part, and case remanded for trial on the merits.

Stubbs, Theus, Grisham & Thompson, of Monroe, for appellant. Julius T. Long, of Winnfield, for appellee Jones.

PROVOSTY, J. The petition in this case reads as follows:

"To the honorable the judge of the Fifth judicial district of Louisiana holding sessions of court in and for the parish of Jackson: The petition of the Tremont Lumber Company with respect represents: (1) That it is a corporation organized and chartered under the laws of the state of Louisiana, with its domicile at Tremont, in the parish of Lincoln and state of Louisiana, with Samuel J. Carpenter as its president. (2) That it is the owner of a large amount of timber and cut-over lands and other property situated in your said parish of Jackson and state of Louisiana. (3) That on the 2d day of September, 1915, the State Board of Equalization of the state of Louisiana, in legal session in the city of Baton Rouge, which is the domicile of said board and the capital of the state of

Louisiana, passed a resolution and adopted a report, or supplemental report, fixing the classification of timber lands for the purpose of assessment for the year 1916, and fixing the value of each classification. (4) That prior to the 1st day of April, 1916, and within the time fixed by law for rendering property for assessment, your petitioner returned all of its property, including its timber and timbered lands, to the assessor of your said parish of Jackson, and that said assessment as rendered by your petitioner, including the classification of its timber, was duly accepted by said assessor, as is more fully shown by the original assessment sheets in the possession of said assessor, which are made a part of this petition by reference. (5) That the classification of your petitioner's said timber as given in to said assessor and as accepted by him was a correct classification and the legal assessment, and represented the true amount of the merchantable timber on said land; and, as above alleged, was accepted by said assessor, viz. A. H. May, as a correct rendition of the said property for assessment as shown by said assessment sheets rendered and sworn to in accordance with law. (6) That on or about the 17th day of June, 1916, the police jury of your said parish of Jackson, while sitting in its capacity as a board of reviewers, over the protest and objection of your petitioner, changed the classification of a portion of the merchantable timber on a portion of the lands, and ordered a material change and raise in said classification, which materially increased petitioner's assessment; and, while the increase in assessment for the year 1916 will not amount to an actual increase in taxes that would have to be paid by your petitioner to the sum of two thousand dollars (\$2,000), it is materially in excess of one hundred dollars (\$100), and, if the classification is permitted to remain as ordered fixed by said police jury, the increased taxes for the year 1916 and subsequent years will be greatly in excess of the sum of two thousand (\$2,000) dollars. (7) That the rendition and classification as made and returned by your petitioner, and the assessment made thereon by said A. H. May, was correct, and that the classification and assessment resulting therefrom, as ordered by the police jury as a board of reviewers, is excessive and illegal, and should be reduced to the classification and assessment as returned by your petitioner. (8) That petitioner appeared before said board of reviewers, and in the manner required by law asked that the assessment as originally made be maintained. These premises considered, your petitioner prays that A. H. May, tax assessor of the parish of Jackson, W. S. Jones, sheriff and tax collector of said parish of Jackson, and the police jury of said parish of Jackson, through its president, W. T. Hawthorn, be served with a copy of this petition, and cited to answer same in accordance with law, and on final trial had that the increase in classification ordered made by said police jury be annulled, and your petitioner's assessment reduced, both in classification and amount,

as rendered and accepted by said assessor, and that said sheriff and tax collector be enjoined and restrained from collecting or attempting to collect any taxes in excess of the classification and amounts as rendered by your petitioner for assessment. Petitioner prays for all other needful orders and decrees in the premises and for general relief."

It will be noted that the object of this suit is to have the court pass upon the correctness of the classification of certain lands, and yet that these lands are not described otherwise than by the statement that they are timber and cut-over lands, and belong to the petitioner, and are situated in the parish of Jackson, and that they and their classification "is more fully shown by the original assessment sheets in the possession of the assessor, which are made part of this petition by reference." The classification made by the board of reviewers is not alleged even "by reference."

[1] An exception of no cause of action was filed, and overruled, and plaintiff was allowed to amend. The exception should have been sustained. In our system of pleading, form is not sacramental; so that a petition may be composed in part of documents annexed to it and alleged to be made part of it. Recitals contained in documents incorporated into a petition in that manner are considered as made in the petition. But this is and can be true only when the documents are actually made part of, or incorporated into, the petition. And they are evidently not thus incorporated when they are merely referred to; or, as the petition in this case expresses it, are merely "made part by reference." Their contents are not then communicated to the court and to the pleader's adversary. Nothing is then stated upon which the court can act; for, evidently, a court can act only upon what is in the record, not upon something that can be discovered or ascertained only by going to consult some papers said to be in some assessor's or other office.

In this case, for pronouncing judgment in favor of plaintiff on the face of the petition the court would have to decree the classification submitted by plaintiff to the assessor to have been right without knowing what lands were in question and what the classification was, and to decree the classification made by the board of reviewers to have been wrong without knowing what it was.

Far from sanctioning or tolerating such looseness as this, our Pleadings Act (Act 300, p. 611, of 1914) is, on the contrary, very specific that—

"the plaintiff in his petition \* \* \* shall, so far as practicable, state each of the material facts upon which he bases his claim for relief in a separate paragraph;"

and that the defendant shall—

"either admit or deny specifically each material allegation or fact contained in plaintiff's petition."

[2] The amendment should not have been allowed. A petition upon which no judgment can be pronounced does not show a cause of action; and a petition which does not show a cause of action is, legally speaking, no petition, and hence cannot be amended. For definition of a petition, see *American Sugar Refinery Case*, 138 La. 1014, 71 South. 137. In *Abadie v. Berges*, 41 La. Ann. 283, 6 South. 529, this court said: "The court is powerless to authorize an amendment which would insert a cause of action when none was previously averred." In *State v. Hackley, Hume and Joyce*, 124 La. 854, 50 South. 772, the court said: "Unless a cause of action is alleged there is no suit, and hence nothing to amend." See these cases quoted with approval in *Godchaux v. Hyde*, 126 La. 187, 52 South. 269.

[3] Where a cause of action is stated for the first time in a supplemental or amended petition, the filing of the supplemental petition must be considered to be the beginning of the suit; the suit must be considered as

dating only from such filing, and not from the filing of the original petition; and the supplemental petition must be served upon the defendant, and the delays for answering must be allowed as in the case of an original petition. *Hart & Co. v. Bowie*, 34 La. Ann. 323; *Raymond v. Palmer*, 35 La. Ann. 281; *Ursuline Nuns v. Depassau*, 7 Mart. N. S. 645; 1 C. J. 1159. In the instant case the supplemental, or amended, petition was not served on defendants; defendants were never cited to answer it; they duly excepted on that ground to being required to answer it.

[4] But the serving of it would have been of no avail, as the date of its filing was the 6th of November, five days after the expiration of the delay allowed by law for the filing of suits of that character. "The action to test such correctness [the correctness of an assessment] shall be instituted on or before the first day of November of the year in which the assessment is made." Section 26 of Act 170, p. 346, of 1898. The defendants duly excepted on that ground also.

Plaintiff's suit was not at first accompanied by an injunction, but before it could be tried the property was advertised to be sold to satisfy the taxes assessed against it on the classification made by the board of reviewers, and an injunction was then sued out.

Defendants moved to dissolve it on the ground that in obtaining it the several requirements prescribed by the Revenue Law (Act 170, p. 346, of 1898, § 56) were not observed, to wit:

"No injunction restraining the collection of any tax or taxes shall be issued by any court unless a bond shall first be given, by the taxpayer enjoining, with good security for an amount equal to that of all taxes, interests, penalties and costs of the amount of taxes contested, and fifty per cent. additional thereon included, and no injunction shall issue except to enjoin the collection of that portion of the tax which may be in contest, and no injunction shall issue against the collection of that part or portion in contest until the taxpayer shall have produced and filed the tax collector's receipt showing that the taxpayer has paid that portion of the tax \* \* \* not in contest, and



which the taxpayer acknowledges to be due. No injunction against the collection of taxes or any part or portion thereof shall issue except after the issuance of a rule nisi, to be served on the tax collector, returnable in three days. Said rule shall be tried on the fourth day after service, summarily and by preference, and the injunction shall only issue after judgment making the rule absolute and then only for such portion or part of the tax in contestation as hereinafter provided."

[5-8] The amount of the taxes enjoined exceeded largely the amount of the bond given by plaintiff. Plaintiff would seek to escape the consequence of this discrepancy by invoking the principle that an injunction will not be dissolved where there is ground for injunction, and the sole effect of the dissolution would be to subject the litigant to the trouble or expense of suing out another injunction; and by invoking Act 112 of 1916, by which a litigant is allowed to furnish a new bond when the one furnished "is insufficient in amount or incorrect by reason of errors or omissions."

The rule is that where, in a tax contesting case like this, the bond is insufficient in amount, the injunction must be dissolved. *Paepcke Leight Lbr. Co. v. Clack, Tax Col.*, 137 La. 397, 68 South. 739; *Howcott v. Smart*, 125 La. 50, 51 South. 64. Moreover, the injunction being merely ancillary to the suit to contest the assessment, there can be no ground for injunction when the suit to contest has not been filed in time; and the suit in this case was not filed in time. Again, there can be no ground for injunction until the uncontested part of the taxes has been paid, and the tax collector's receipt for it produced; and while plaintiff alleged in the supplemental petition that payment of this uncontested part had been tendered and refused, plaintiff made no effort to prove that fact on the trial, although it was specifically denied in the answer of defendants. Defendants' counsel says that the only tender made was on the condition that a receipt in full should be given; and we are inclined to be-

lieve it, for why, else, refuse to accept the money. We need hardly add that a tender so conditioned would have been nothing more than a mere pretense at a tender, and futile.

[9] The insufficiency of the bond in this case is not shown to have been the result of error or omission; hence said Act 112 of 1916 can have no application.

[10] Another clear ground why the injunction was properly dissolved is that its issuance was not preceded by a rule nisi. How the law on this point could be more stringently worded than by the above transcribed statute we cannot imagine. Plaintiff would seek to escape by saying that the motion to dissolve on that ground was filed too late, it having been filed after issue had been joined on the merits. No reason is given why this peremptory ground of dissolution, almost if not quite of the nature of a law of public order, should be considered to have been waived by its not having been urged in the answer; and we can conceive of none.

In cases of this kind, contesting taxes, section 56 of the Revenue Law requires that the contesting party, if defeated in the suit, must be condemned to pay, as attorney's fees, 10 per cent. on the aggregate amount of the taxes and penalties involved in the suit. Upon the contested part of the taxes and penalties plaintiff is clearly liable to this penalty. Whether plaintiff is liable to it upon the uncontested part depends upon whether a tender of this uncontested part was made unconditionally, or only, as stated by counsel for defendants, on the condition that a receipt in full should be given, or on any other condition. The record leaves the court in doubt on that point, and a penalty should not be imposed in doubt. Therefore for determining whether this 10 per cent. penalty should be imposed upon the basis of the entire amount of the taxes and penalties due by plaintiff or only of the uncontested part, we shall remand the case for further trial.

The judgment appealed from is therefore affirmed, except in the matter of the attorney's fees, as to which it is remanded for further trial, with instructions that judgment be rendered against the plaintiff in favor of the defendants for 10 per cent. as attorney's fees, upon the basis of the contested part of the taxes and penalties herein, and, in the event the tender made by plaintiff to the tax collector was on the condition that a receipt in full should be given, or was made otherwise than unconditionally, then that judgment be also rendered for such attorney's fees upon the basis of the uncontested part of said taxes and penalties, and that the plaintiff pay all the costs of this suit.

O'NIELL, J., dissents from the ruling that the plaintiff's petition did not set forth a cause of action.

#### On Rehearing—Statement of the Case.

MONROE, C. J. The original petition in this case having been reproduced in the opinion heretofore handed down, we now merely summarize those of its allegations which are immediately pertinent to the questions presented for decision, as follows, to wit:

That plaintiff owns a large amount of timbered and "cut-over" land, in Jackson parish (which, however, is not otherwise identified or described); that in September, 1915, the State Board of Equalization fixed the classification of timbered lands, and the value of each classification for the purposes of the assessment for the taxes of 1916; "that prior to the 1st day of April, 1916, and within the time fixed by law for rendering property for assessment, your petitioner returned all of its property, including its timber and timbered lands, to the assessor of your said parish of Jackson, and that said assessment as rendered by petitioner, including the classification of its timber, was duly accepted by said assessor, as is more fully shown by the original assessment sheets in the possession of said assessor, which are made a part of this petition by reference; that the classification of your petitioner's said timber, as given in by your petitioner to said assessor and as accepted by him, was a correct classification and legal assessment, and represented the true amount of the merchantable timber on said land"; and that "same was sworn to in accordance with

law"; "that on or about the 17th day of June, 1916, the police jury, \* \* \* while sitting as a board of review, over the protest and objection of your petitioner, changed the classification of a portion of the merchantable timber on a portion of the lands, and ordered a material \* \* \* raise in said classification, which materially increased petitioner's assessment, \* \* \* and, if the classification is permitted to remain as fixed by said police jury, the increased taxes for the year 1916 and subsequent years will be greatly in excess of \* \* \* \$2,000"; that the rendition and classification, as made and returned by your petitioner, and the assessment, made thereon by said A. H. May, were correct, and that the classification and assessment, \* \* \* as ordered by the police jury as a board of review, is excessive and illegal, and should be reduced to the classification as returned by your petitioner; that petitioner appeared before said board of review, and, in the manner required by law, asked that the assessment as originally made be maintained.

"Wherefore petitioner prays that the assessor, the collector, and the police jury, through its president, be cited, and that the increase in classification ordered made by said police jury be annulled, and your petitioner's assessment reduced, both in classification and amount, as rendered, and accepted by said assessor, and that said sheriff and tax collector be enjoined and restrained from collecting, or attempting to collect, any taxes in excess of the classifications and amounts as rendered by your petitioner for assessment."

The petition was filed October 30, and service was accepted by the two first-mentioned defendants, and made in person on the president of the police jury on the same day. Defendants, on November 6 following, filed a pleading, setting up, in the same instrument, the following grounds of exception, to wit: That the petition discloses no cause of action; that plaintiff's right to bring such an action became prescribed within 10 days after the police jury raised the assessment complained of and adjourned, and expired prior to October 30, and, especially, at the moment the assessment rolls were filed with the tax collector; that the inclusion of the assessor among the defendants was an improper joinder of parties; that the allegations of the petition are so vague and indefinite as to render a specific answer impossible, and that the suit should be stricken from the docket "on the ground that it is no

suit and does not disclose any cause of action"; that, in the event some of the foregoing pleas and allegations are not sustained, plaintiff should be ordered to amend its petition by setting forth each piece of land upon which it is alleged that the assessment is too high. The minutes of the court show that on February 16, 1917, the exception of no cause of action was overruled, and the exception of vagueness maintained, and plaintiff ordered to amend its petition; which was followed on May 7 by an order fixing May 14 as the day upon which the amended petition should be filed; and it was filed on May 12, and reads, in part, as follows:

"Now into court comes \* \* \* petitioner, \* \* \* and, in obedience to the order \* \* \* rendered herein \* \* \* to be more definite as to the description of the property on which the assessment \* \* \* was raised, \* \* \* with leave of the court begs to amend its original petition filed herein as follows:

"(1) At the close of paragraph 4 in the original petition, \* \* \* petitioner asks to add the following words: 'Which original assessment, as rendered by your petitioner, is attached hereto and made part hereof for full and complete certainty as to the classification placed on the said property by your petitioner and accepted by the said assessor.'

"(2) At the end of the 6th line of paragraph 6 of the original petition, \* \* \* and after the word 'assessment,' your petitioner asks to amend the said paragraph by inserting the following words: 'Certified copy of the ordinance of the police jury, sitting as a board of review, changing and increasing the classification of the timber belonging to your petitioner, and describing the land on which it is situated, and the original and supplemental assessment sheet, made by the assessor thereon, are hereto attached and made part hereof, for full and complete certainty as to the increase in grade of classification made by the said police jury while sitting in its capacity as a board of review.'

"(3) Your petitioner attaches the documents referred to herein to this amended petition, and asks that the original petition be amended as herein indicated, and that the documents herewith be made a part of the original petition filed herein. As thus amended, your petitioner re-adopts the original petition and \* \* \* the prayer," etc.

The documents thus referred to were, accordingly, filed, and on May 14 plaintiff caused judgment by default to be entered. On May 16 defendants moved to set aside the

default, and that the suit be dismissed on the ground that the amended petition had not been filed or served at the proper time; on May 30 plaintiff filed a supplemental petition, setting forth the institution of the suit on October 30, 1916, and alleging that thereafter and prior to January 1, 1917, when the taxes of 1916 became delinquent, it had tendered to the collector the full amount of the taxes due to the state, the parish, and the other—

"subdivisions of the parish of Jackson, including all special taxes of every nature and kind, and demanded a receipt for the payment of the taxes due and as shown by its assessment duly given, in and all in accordance with plaintiff's original petition and subsequent bill of particulars, which tender was refused, and said \* \* \* collector refused to issue the receipt or other evidence showing the payment of said taxes, and refused to cancel said taxes on the assessment roll; that, notwithstanding your petitioner has tendered the full amount of taxes due by it, the said \* \* \* collector has advertised the whole of your petitioner's property in the parish of Jackson for sale for taxes, which property is worth more than \$100,000," etc.;

and praying for a preliminary injunction prohibiting the threatened sale; which writ was issued, on a bond for \$1,000 enjoining the collector "from proceeding further with said proposed sale," though we fail to find the order of court authorizing it or fixing the amount of the bond. On June 4 defendants filed a pleading which reads and may be stated in substance as follows, to wit:

"Now into court come \* \* \* defendants, \* \* \* reserving all their rights under pleas of prescription, exception of no cause of action, and alternative plea to dismiss plaintiff's suit on the ground of vagueness, \* \* \* all of which were overruled by the court except the alternative plea as to vagueness, and on which, on February 17, 1917, the court ordered plaintiff to amend, and now alleges, moves, and prays that the pretended amended petition filed herein by plaintiff, on May 12, 1917, and the so-called injunction against the sale of property, \* \* \* and the entire proceedings, including original petition of plaintiff, be and should be dismissed and stricken from the records of this court for the following causes and reasons:"

That the pretended amended petition was filed without authorization of court, and defendant has not been cited to answer it; that it attempts to amend the original petition "as to what

the suit is about, when the original petition was totally silent as to what this suit was about or as to the specific things in controversy," and therefore defendants were entitled to service and citation; that it does not answer the requirements of the court, is too vague and indefinite and uncertain, "and unusual to the manner of pleadings adopted by the laws and courts of Louisiana," and should, for that reason, be stricken from the records; that the pretended attached copies of the raise made by the police jury and the return of assessment made by plaintiff are not to be considered proper allegations in a petition; that defendant is entitled to neat, specific, allegations, made in such a manner that they can be conveniently and intelligently answered; that the petition for injunction was filed as a supplement to the original petition, but with no order of court authorizing it, and should therefore be dismissed and stricken out; that the pretended supplemental injunction suit was filed too late, plaintiff having waived its right by permitting its property to be advertised to within two days of the sale; that the time for filing amendments setting forth the matters involved in the suit expired long before any proper amendment was served; and defendants deny that any amendment has ever yet been legally allowed to be filed or served. They pray that all of plaintiff's proceedings, including original, amended, and supplemental petitions, be dismissed.

The minutes of June 4 show that the motion to set aside the default and the motion and exception last above mentioned were taken up, considered, and, in part, disposed of as follows:

"Motion to dismiss. Exception of no cause of action and plea of prescription as to all proceedings in this case, and particularly to both amended petitions, filed by defendants.

"Whereupon the trial of said motion was taken up, tried, and sustained, so far as prematurity of default is concerned, and default set aside, and further exception as to amended petition not having fully complied with the order of court, it is overruled and amended petition allowed, and other exceptions are continued until June 8, 1917."

The minutes of June 8, read:

"The exception filed herein on June 4, 1917, is overruled in toto, and the amended petition and injunction are allowed."

On the same day (June 8) defendants filed an answer and reconventional demand, in which latter they set up a claim for damages and attorney's fees. On June 25 they filed a motion to dismiss the suit and dissolve the

injunction upon the following grounds, to wit: That all suits for the reduction of assessments must be filed before November 1 of the year in which the assessment is made, and that no such suit was filed by plaintiff; that the law provides that no injunction against the collection of taxes, or any part or portion thereof, shall issue except after the issuance of a rule nisi, to be served on the tax collector, returnable in three days, and after judgment making the rule absolute, and then only for such portion of the tax as may be in dispute, and upon the production of a receipt for the portion not in dispute, and that none such shall issue unless a bond be first given, with good surety, for an amount equal to that of the tax enjoined, with interest, penalties, and costs, etc.; but that the injunction herein was issued without rule, notice, or receipt, and upon a bond for an amount less than the amount of the tax enjoined. The prayer is that all the proceedings be dismissed, the injunction dissolved, and plaintiff condemned to pay attorney's fees to the amount of 10 per cent. upon the aggregate of the taxes; the collection of which is enjoined and interest and penalties, etc. The tax collector then filed an amended answer; plaintiff filed a motion to strike out the motion last filed by defendants; and the parties went to trial on the motion and counter motion (though, on June 14, the case had been set down for June 25, on its merits, "without prejudice"), and after the taking of certain testimony showing that the tax rolls were filed with the collector on October 30, 1916, at about 12:30 p. m., and that the petition in this suit (and in two other suits similar in character) had been filed an hour or two later, on the same day; and, after hearing the parties, the trial judge, "being of the opinion that the motion to dismiss the suit and dissolve the injunction was well founded, and that the demands therein contained should be allowed," gave judgment as follows:

"It is ordered, adjudged, and decreed that plaintiff's suit be and is hereby dismissed, its injunction dissolved, at its cost, and that the plea of prescription, made in said motion by said defendants, be sustained, and that plaintiff pay all penalties provided by existing laws, and that the said tax assessor, sheriff, and police jury of Jackson parish do have and recover from plaintiff the sum of 10 per cent. as attorney's fees on the sum of \$14,674.93 of taxes whose collection was enjoined by said writ of injunction."

Plaintiff has appealed, and defendants have answered the appeal, praying that the judgment be amended so as that it shall decree and make it certain that the award of 10 per cent. in favor of the assessor and collector is for attorney's fees which are to be collected by those officers and paid over to the attorney; that, should this court fail to affirm the judgment as rendered, it should sustain the exceptions of no cause of action and prescription, as originally filed, on November 6, 1916, and as filed on June 4, 1917.

#### Opinion.

[11] A petition discloses a cause of action when its allegations of fact, if taken as true, would entitle the petitioner to the relief prayed for; and, for the purposes of an exception of no cause of action, such allegations are taken as true. In the instant case the relief prayed for by plaintiff in its original petition was (as we have stated) that—

"the increase in classification ordered made by said police jury be annulled, and your petitioner's assessment reduced, both in classification and amount, as rendered, and accepted by said assessor, and that said sheriff and tax collector be enjoined and restrained from collecting or attempting to collect any taxes in excess of the classifications and amount as rendered by your petitioner for assessment."

The allegations upon which that prayer is based are, in substance, that plaintiff made a correct classification and valuation of its timber and timbered lands, and made a sworn return of the same to the assessor, prior to April 1, 1916, as required by law; that the assessor accepted the return so made as cor-

rect, "as is more fully shown by the original assessment sheets, which are made part of this petition by reference"; that the police jury, sitting as a board of review, over plaintiff's protest, raised the classification of a portion of the merchantable timber on a portion of its lands, thereby increasing the assessment, which, as thus increased, is excessive and illegal; wherefore it prays, etc.

The case thus stated appears to us, upon further consideration, to be that for which provision is made by Act 182 of 1906, § 3, p. 332, in declaring that each taxpayer (parish of Orleans excepted) shall make a return of his property for assessment before April 1 of each year, in default of which, for any cause whatever, he shall be estopped from contesting the assessment as filed by the assessor; and Act 170 of 1898, in declaring that it shall be the duty of the assessor to assess all property subject to taxation and lying within his parish at its actual cash value, and lay his lists before the board of review; that it shall be the duty of such board to scrutinize the lists, and either approve them, or disapprove after notifying and hearing the assessor, as they may think proper, the valuation as fixed by the board to be final unless otherwise ordered by the courts; that it shall be the duty of the board to receive and hear the taxpayer who desires to contest the valuation of the assessors, and to correct such valuation contradictorily with the assessor if found to be incorrect, and that, if the claims of the taxpayer be not approved, he may seek relief in the courts; that no valuation by the assessor shall be increased without notice to the taxpayer, who shall have his action before the courts in the event of an adverse ruling, but that all such suits shall be instituted prior to November 1 of the year in which the assessment is made, and that the tax collector shall be made a party thereto.

The exception of no cause of action was

based, as we understand the argument of defendants' learned counsel, upon the ground that the petition did not, of itself, identify the property, the increased assessment of which it sought to have annulled, and failed to state the amount to which it desired the court to reduce the assessment; that it would therefore be impossible to render the judgment as prayed for therein, and that the court would not go outside of the pleading, which, alone, had been filed in the case, for the information necessary to enable it to discharge that function. It will be observed that defendants, in the alternative, interposed the exception of vagueness, and prayed the court, in the event of its not sustaining some other of their exceptions, to order plaintiff to amend its petition, and that the court overruled the exception of no cause of action, and, without specifically noticing the exceptions of prescriptions and misjoinder, sustained that of vagueness, and ordered plaintiff to amend, which plaintiff did by filing its return and the assessment sheet as prepared by the assessor and amended by order of the board of review, thereby furnishing a description of the property involved, showing both the original and increased assessments, and hence showing the amount to which plaintiff prayed that the increased assessment be reduced. That ruling, we think, was correct. The petition, of itself, sets forth a cause of action (though not with the particularity that defendants had the right to demand) in alleging that plaintiff had made a sworn return of its property prior to April 1, 1916 (that is to say, in the manner and within the time required by law); that it had been accepted and acted on by the assessor, and was, in fact and in law, correct; and that, by order of the board of review, the classification and assessment, as so returned and acted on, had been changed to a higher classification, which was incorrect, and to a consequent increased

assessment, which, being also incorrect and excessive, was illegal. Pretermittting the questions of estoppel and presumption which are said to arise from plaintiff's alleged failure to make the proper return and to bring this action before November 1, 1916, its cause of action arose from the (alleged) error of the board of review in altering, to its prejudice, a correct classification and assessment of its timber, being the act of the defendant board, of which it was bound to have knowledge, and the official evidence of which was alleged to be, at that time, in the possession of its codefendant, the assessor—the facts in that connection, as we understand them, being that plaintiff's return was delivered to the assessor, who based his assessment thereon, and laid the same before the board of review; that the board ordered the assessment to be increased, which having been done, the assessment sheet, with both the original and the increased assessments showing thereon, as delivered, either by the assessor or the board, to the collector, the delivery last mentioned having been made on the day, and an hour or two before, this suit was instituted, and two days before the expiration of the delay to which plaintiff was entitled for its institution. Defendants were therefore in rather a better position, with the evidence of their own acts in their possession, to know the facts upon which plaintiff is bound to rely for the success of its suit than was the plaintiff, and it might very well have happened that it would have been impossible for plaintiff to have made any other allegations than those which it did make: as, for instance, let us suppose that the officer in charge of such matters, having made the proper return for assessment, and having appeared before the board of review to contest an increase, had gone away, or had died, and that, at the last moment of the last day of the delay allowed for bringing suit, his successor had learned that the board has in-

creased the assessment upon 50 out of 100 tracts of land, but had not learned the amount of the increase or the particular tracts affected, what more could he do—having no time to obtain that information—than to file a petition setting forth that a return had been made (stating the manner and time); that it had been adopted as the basis of the original assessment; that the assessment represented the true value of the property; that an appearance had been made before the board contesting a proposed increase; and that, at the last moment, an increase had nevertheless been made, but that he was uninformed as to the amount or the particular property to which it applied, and, for the further information of the court upon that subject, made the assessment sheet itself a part of his petition. The law requires the board to notify the assessor of its action in such cases, but it does not require it or the assessor to notify the taxpayer.

[12, 13] Returning then to the concrete case now under consideration, the trial judge, finding, as we assume, that the petition disclosed a cause of action, though imperfect in its details, overruled the exception of no cause of action, and, maintaining the exception levelled at the imperfection, ordered plaintiff to amend the petition accordingly, which was done by the filing of the missing assessment sheet and the return, a ruling authorized by law and sanctioned by the decisions of this court. In fact, whilst it is well settled that no amendment can be allowed after an exception of no cause of action has been sustained, and while there is a certain limit beyond which a court cannot go in allowing amendments after issue joined, the matter of allowing amendments before such action has been taken is practically left to the discretion of the trial judge, though it would appear that where a plaintiff claims less than is due him, or fails to claim interest upon his debt, he may set up his belated claim by

amendment, as a matter of right. C. P. 156, 157. If there is any case in our books where a plaintiff has been denied the right to amend a petition imperfectly stating his cause of action, when leave to amend has been asked, before the court has otherwise acted in the matter, or where, upon the hearing of an exception of no cause of action, he has been denied the right to produce documents alleged to have been annexed to and made part of the petition, but not so annexed, it has not been called to our attention.

*Police Jury v. Mahoudeau*, 27 La. Ann. 224, was a suit founded upon notes secured by mortgage, which appears to have been dismissed by the trial judge for "insufficiency of description of the instruments sued on," which instruments, though alleged to have been made part of the petition, were not filed therewith, but, as we infer, were produced on the trial of the exception. In reversing the judgment appealed from, the court said:

"If the description were materially defective, the plaintiffs should have been allowed, under the circumstances, an opportunity to amend before their suit was dismissed. But we are inclined to think that, although the petition is loosely constructed, the documents, being made a part thereof, supply any deficiency therein in relation to their nature and contents, and that the only consequence of a failure to file them at the time of filing the petition is that the defendant may refuse to answer until he has oyer of them." [*Smith Heirs v. Blunt*] 2 La. 133; C. P. 175. The acts of mortgage and the notes on which the action is based are sufficiently described to fix their identity and purport, and, being a part of the petition, they, with it, contain a full statement of the cause of action, including an accurate description of the property affected by the mortgage."

In *Hewitt v. Williams*, 47 La. Ann. 744, 17 South. 269, it appeared that the suit was brought on accounts and notes, which, as we infer, were not alleged to be annexed to, or made part of, the petition, and which were not so annexed, and defendant excepted upon that ground and because the petition gave no sufficient description of such writings, nor of any of the items given in

them, or other description of what they purported to represent; upon which exception the court made the following ruling, to wit:

"It is no cause for the dismissal of the suit that the plaintiff fails to annex documents to the petition. An intelligent cause of action set forth in the petition is sufficient. The defendant, of course, has the right to demand an exhibit of the documents, and, on the failure of the plaintiff to produce them, he will not be required to answer the demand against him, and the dismissal of the suit will be the penalty of plaintiff's failure to produce. \* \* \* In the case at bar the notes are accurately described in the petition, but are not made part of the same; and the statement of the account in the petition is based upon a bank account for money advanced to defendant, placed to his credit, and which he drew out on his own checks, or by checks for supplies drawn by the Hicks Company, Limited, on the order of defendant. He must then have known his exact standing with the bank, and he stands in the same position as one to whom a detailed statement is made. \* \* \* If the notes are produced on the trial and tendered to defendant, he certainly has no cause to complain, as his payment to the holder would be valid extinguishment of the notes."

In *Lamorere v. Cox*, 32 La. Ann. 1045, being a suit upon a mortgage and certain judicial proceedings, which were alleged to be annexed to the petition but were not so annexed, the court said (inter alia):

"We have, however, no hesitation in stating that where the allegation is formally made that a document, record, or other writing is annexed and made a part of a petition, and it is not so annexed, *nor even filed in evidence, when exception is made [tried] to the cause of action or sufficiency of the petition.* \* \* \* it should not be considered as forming part of the petition." (Italics by present writer.)

It was found in the case cited, however, that the allegations of the petition, without the missing documents, disclosed a cause of action, and the judgment, maintaining the exception of no cause of action, was reversed and the case remanded.

In *Carroll et al. v. Cockerham et al.*, 38 La. Ann. 817, plaintiff sued to annul a dation en paiement, alleged to have been made by their father to the prejudice of their légitime, and defendants filed an exception of no cause

of action, based upon the ground that the petition did not afford the information whereby the amount of the légitime could be determined. The trial judge ordered that the exception be sustained, unless the plaintiffs should amend their petition in three days, setting forth the amount of their father's debts at the time of his death and of their légitime. The privilege of amending thus granted was objected to by defendants, and the objection was disposed of by this court as follows:

"The exception, in effect, charged that the allegations of the petition were insufficient to justify the relief sought inasmuch as they did not afford the information by which the amount of the légitime could be determined.

"We think, under the circumstances, the ruling was a proper one, and the defendant was not prejudiced thereby. \* \* \* Defendant cites in support of his contentions several decisions of this court. They are not in point; they only go to the extent that, after there has been an unqualified dismissal of the suit on an exception of no cause of action, plaintiff cannot be permitted to amend."

The court then goes on to say that the fixing of the amount of the légitime was, moreover, a matter of proof, and that the allegation that it was due, with certain other allegations, sufficed to authorize the admission of such proof, and hence that the trial judge had erred in sustaining the exception, even conditionally.

In *Scruggs v. Endom*, 123 La. 894, 49 South. 630, it was said by the court:

"Plaintiff's petition did disclose a cause of action; but it was a cause of action imperfectly and defectively stated. Defendant had the right to object to its vagueness, and to have called on him to amend the same. He did not do so, but reserved his objections until the trial of the case, and then urged them by way of objections to evidence not covered by the pleadings. We think, from a technical point of view, the objections urged were correct; but inasmuch as, by reason of those objections and through evidence introduced in his own behalf, this court has been uninformed upon a question vitally important for just decision upon the rights and obligations of the parties, and matters can be positively established one way or the other, by evidence not difficult of procurement, we have reached the conclusion that, in the interest of



justice, the judgment appealed from should be reversed and the cause remanded to the district court, and reinstated on the docket, to be further proceeded with according to law; the right being granted to plaintiff to amend his pleadings and make his demand more specific under the cause of action declared upon."

It has been held that amendments should be allowed to petitions even after issue joined, where they merely supply omissions in, or amplify the general allegations, or where they tend to the furtherance of justice, and do not retard the case or operate to the injury of the opposing litigant. *Jelks v. Smith*, 5 La. Ann. 674; *Richardson v. Fenner*, 10 La. Ann. 600; *State ex rel. Southern Bank v. Pillsbury*, 31 La. Ann. 9; *Payme v. Railroad & S. S. Co.*, 38 La. Ann. 164, 58 Am. Rep. 174; *Scruggs v. Endom*, supra; C. P. 819.

The doctrine that the failure to annex a notarial or public act, upon which a suit is founded, to the petition, as required by C. P. 174, does not authorize the dismissal of the suit, but merely relieves the defendant of the necessity of filing his answer until the act is so annexed, and gives him the right to such dismissal in the event of plaintiff's failure to comply with an order of court to produce and file such act, appears to have been first enunciated by this court in *Smith v. Blunt*, 2 La. 132, and, with the exception of the ruling in *Parish v. Municipality*, 8 La. Ann. 145, appears to have been uniformly adhered to up to the present time. *Hillard v. Taylor*, 114 La. 894, 38 South. 594. The trial judge having ordered plaintiff to amend, no further permission for the filing of the petition complying with that order was required. The plea of prescription necessarily fell with the overruling of the exception of no cause of action; for service of citation having been made or accepted by all the defendants prior to November 1, it could have had nothing to rest on save the contention that the original petition disclosed no cause of action, and was not to

be regarded as a suit, within the meaning of the statute requiring such suits as this to be instituted before that date. The trial judge therefore, erred in finally maintaining that exception.

It is said that the petition (called supplemental) upon which the injunction was issued was filed without leave of the court, and we fail to find that any such leave was obtained or that any order was obtained for the issuance of the injunction. As to the necessity for leave to file such a petition, we consider it unnecessary to express any opinion, nor does it matter whether the order for the writ was given, since the writ, in any event, appears to have been issued in entire disregard of several requirements and prohibitions of the law governing the matter, to be found in section 56 of Act 170 of 1898, p. 374, which declares that no injunction restraining the collection of any tax shall be issued save upon a bond for an amount equal to the tax in contest, plus interest, penalties, and costs and 50 per cent. additional; that no such injunction shall issue except to enjoin the collection of that portion of the tax in contest; that none shall issue against such collection until the taxpayer shall have produced a receipt showing that he has paid the portion not in contest, and which he acknowledges to be due; that no injunction against the collection of any tax shall issue until after the favorable determination of a rule nisi, to be served upon the tax collector, made returnable in three days, and tried on the fourth and then only for such portion of the tax in contestation as is provided in the preceding paragraphs of the section.

[14-17] Counsel for plaintiff contend that section 56 of the act of 1898 contravenes article 31 of the Constitution, declaring that a law shall embrace but one object, which shall be expressed in its title. The act in question is entitled:

"An act to provide an annual revenue for the state of Louisiana by the levying of annual taxes upon all property not exempted from taxation, and by prescribing the method of assessing and collecting the same, and of enforcing payment thereof in the several parishes of the state, and setting forth the purposes for which each levy is made."

The single object of the act is to provide a revenue for the state, and the means by which the revenue is to be provided, and improvident and unwarranted obstructions to its collection provided against, are germane to that object. The provisions of the section in question are clearly of that kind. The fact that they differ from the provisions of the Code of practice or of any other statute relating to injunctions, in other cases, does not affect their validity, since the last section of Act 170 repeals all other laws with which the act may conflict.

It is said that the opinion heretofore handed down sets at naught the purpose of Act 112 of 1916, which declares that a conservatory writ shall not be dissolved on account of the insufficiency of the bond, unless the party furnishing the bond fails to make good the deficiency when called upon so to do by his adversary; that the amount of the bond was fixed by the judge, and that the plaintiff should not be held responsible for his error; that a citizen has the "right" to prevent, by injunction, the sale of his property for taxes which have been paid; that, as the petition for injunction alleges that plaintiff tendered payment of the taxes not in contest and that the tender was refused, and as the motion to dissolve is determinable on the face of the papers, that allegation must be taken as true, and the tender be regarded as the equivalent of payment of the uncontested taxes; and, in view of the circumstances stated, "plaintiff had the absolute right, under the law, to avert the sale of its property by the writ of injunction, wholly independent of, and not in any wise controlled by, the provisions of the revenue law, just as it would have had the

right to arrest the sale of its property by the same officer had he been proceeding under an execution to sell plaintiff property for the payment of a debt which it had already paid"; that "jurisprudence has long since established in this state the principle that a writ of injunction will not be dissolved where a party shows by his allegations that he is entitled to the writ, and that immediately after its dissolution another writ would issue"; and, finally, that no rule nisi is required in a case where the petition shows that the plaintiff is entitled to an injunction "independent of the revenue law."

Our consideration of the contentions thus set up has led to the conclusion that neither of them is well founded. Section 2 of Act 112 of 1916 declares that whenever a litigant shall have furnished a bond in a judicial proceeding, and the bond is insufficient in amount or incorrect by reason of errors or omissions therein, such litigant shall have the right to correct such insufficiency, error, or omission in the court of original jurisdiction, and to furnish a new or additional bond; and section 3 declares that:

"The right to furnish such new, or such supplemental or additional bond shall be exercised as follows: The party desiring to furnish such \* \* \* bond shall have the right so to do at any time prior to judgment, if the adverse party \* \* \* shall cause to be served upon him through the proper officer, \* \* \* a notice that such adverse party \* \* \* claims that a bond furnished in the proceeding to which he is a party or in which he has an interest is insufficient either in form or substance \* \* \*; the said party who has furnished such bond shall have the right within two days, exclusive of Sundays, legal holidays and half holidays, to furnish the new bond, or supplemental bond, or additional bond above referred to. If he shall fail to furnish same, the case shall then proceed without any diminution of the right of the adverse party \* \* \* to test the sufficiency of the bond furnished, whether as to the amount of [or] form thereof, or the solvency of the \* \* \* sureties thereon."

As we have stated, the record discloses no order of court authorizing the issuance of the injunction or fixing the amount of bond;

but assuming that such an order was made, and that it has been inadvertently omitted in the making of the transcript, nevertheless the law declares that "no injunction restraining the collection of any tax or taxes shall be issued by any court unless a bond shall first be given \* \* \* for an amount equal to that of all taxes, interest, penalties and costs of the amount of taxes [sic] contested, and fifty per cent. additional thereon included." Conceding, then, that in a case such as this a tax debtor, proceeding in disregard of the plain prohibition of a statute, may obtain an injunction restraining the collection of taxes vitally necessary for the maintenance of the public institutions of a parish, upon furnishing a bond for an amount less than the law requires, or, for that matter, for no amount, and conceding that the only penalty that he is to pay for nonobservance of the prohibition of the law is that he shall furnish a new bond, it nevertheless remains that the right to furnish the new bond is subject to the condition that it shall be exercised before judgment, and within two days after notice of the complaint, by the adverse litigant, of the insufficiency of the bond originally given.

It is true that in the instant case the notice was not given until June 25, 1917, and that the judgment dissolving the injunction and dismissing the suit was rendered on the same day, though plaintiff was entitled to two days, exclusive of Sundays, etc., within which to file the new bond; but it is also true that no new bond was then tendered, that no delay was asked for the making of such tenders, and that, though nearly a year has since elapsed, it is not shown that any new bond has been filed.

The proposition that the provisions of the Code of Practice (which became a law in 1825), authorizing and requiring the issuance of injunctions in the cases therein specified,

control those of a statute enacted in 1870, prohibiting the issuance of injunctions restraining the collection of taxes, save upon the conditions imposed by the statute, and repealing all laws in conflict or inconsistent with its provisions, is plainly untenable.

[18] The contention that, as the petition for injunction alleges that plaintiff tendered payment of the taxes not in contest and the tender was refused, and that the allegation must be taken as true, and the tender regarded as the equivalent of payment of the uncontested taxes, must be considered in connection with the allegations to which it refers, and which, to our understanding, do not convey the idea that plaintiff made any tender of payment of the uncontested taxes, save upon the condition that it should be given a receipt in full for all taxes claimed by the collector. If the intention had been to convey that idea, language could readily have been found to serve the purpose. The statute reads:

"And no injunction shall issue except to enjoin the collection of that portion of the tax which may be in contest, and no injunction shall issue against the collection of that part or portion in contest until the taxpayer shall have produced and filed the tax collector's receipt showing that the taxpayer has paid that portion of the tax which is not in contest, and which the taxpayer acknowledges to be due."

No such receipt was produced, and the allegations of the petition do not convey the idea that a receipt of that character only was demanded.

The statute further provides that:

"No injunction against the collection of taxes, or any part or portion thereof, shall issue except after the issuance of a rule nisi, to be served on the tax collector, returnable in three days."

And we are unable to follow the reasoning of plaintiff's learned counsel whereby they reach the conclusion that no rule nisi is re-

quired in the cases in which the law thus declares that it is required, but that a taxpayer is entitled to restrain the collection of taxes without regard to the law which assumes to regulate such matters.

[19] Still another contention is that a court will not dissolve an injunction if it is apparent that the party in whose favor it was issued would immediately be entitled to another such writ. In this case, however, it is apparent that plaintiff would not immediately be entitled to another such writ. It would not be entitled to enjoin, as it has done, the uncontested taxes at all, nor the contested taxes, save after the hearing of a rule nisi, which, for aught we know, might be dismissed.

It is therefore now ordered and decreed that the judgment appealed from be annulled in so far as it maintains the plea of prescription herein filed, and dismisses this suit, and in so far as it condemns plaintiff to pay all penalties provided by existing laws and 10 per cent. attorney's fees. It is further decreed that the case be remanded to the district court, to be tried upon its merits, and that the rights of the litigants, with respect to such penalties and fees, be reserved and determined by the judgment hereafter to be rendered. It is further decreed that, in so far as said judgment dissolves the injunction herein issued, it be affirmed, without prejudice, however, to the right of the plaintiff to obtain such injunction as it may be entitled to upon its complying with the law and particularly with the requirements of section 56 of Act 170 of 1898.

It is further decreed that the costs of this appeal be paid by plaintiff, and that those of the district court await the result of the trial.

PROVOSTY, J., adheres to views expressed in the original opinion, but otherwise concurs in the decree.

(78 South. 660)

Nos. 22773, 22774.

LOUISIANA CENTRAL LUMBER CO. v.  
MAY, Assessor, et al.

DAVIS BROS. LUMBER CO., Ltd., v. SAME.  
(Jan. 3, 1918. On Rehearing, April 29, 1918.)

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

Suits by the Louisiana Central Lumber Company and Davis Brothers Lumber Company, Limited, against A. H. May and others. From the judgment, plaintiffs appeal. Judgment annulled in part and affirmed in part, and case remanded for trial on the merits.

Stubbs, Thens, Grisham & Thompson, of Monroe, for appellants. Julius T. Long, of Winnfield, for appellees W. S. Jones, Tax Collector, and Police Jury of Jackson Parish.

PROVOSTY, J. This case presents the same issues precisely as that of Tremont Lumber Co. v. Same Defendants, 78 South. 650,<sup>1</sup> this day decided. The two cases were consolidated for trial.

For the reasons there assigned, the judgment appealed from is therefore affirmed except in the matter of the attorney's fees, as to which it is remanded for further trial, with instructions that judgment be rendered against the plaintiff in favor of the defendants for 10 per cent. attorney's fees, upon the basis of the contested part of the taxes and penalties herein, and, in the event the tender made by plaintiff to the tax collector was on the condition that a receipt in full should be given, or was made otherwise than unconditionally, then that judgment be also rendered for such attorney's fees upon the basis of the uncontested part of said taxes and penalties; and that the plaintiff pay all the costs of this suit.

O'NIELL, J., dissents.

On Rehearing.

MONROE, C. J. The facts in this case being similar to, and the legal principles applicable thereto being identical with, those governing the case of Tremont Lumber Co. v. A. H. May, Assessor, et al., 78 South. 650<sup>1</sup> (No. 22772) this day decided, the reasons given for that judgment are assigned for this; and it is therefore now ordered and decreed that the judgment appealed from be annulled, in so far as it maintains the plea of prescription herein filed and dismisses this suit, and in so far as it condemns plaintiff to pay all penalties provided by existing laws and 10 per cent. attorney's fees.

It is further decreed that the case be remanded

<sup>1</sup> Ante, p. 389.

to the district court to be tried upon its merits, and that the rights of the litigants with respect to such penalties and fees be reserved and determined by the judgment to be hereafter rendered.

It is further decreed that, in so far as said judgment dissolves the injunction herein issued, it be affirmed, without prejudice, however, to the right of plaintiff to obtain such injunction as it may be entitled to, upon its complying with the law, and particularly with the requirements of section 58 of act 170 of 1898.

It is further decreed that the costs of this appeal be paid by plaintiff, and that those of the district court await the result of the trial.

(78 South. 661)

No. 23012.

STATE v. GRIMMS.

(April 29, 1918.)

(*Syllabus by the Court.*)

1. INDICTMENT AND INFORMATION  $\S$  159(4)—  
CHANGE BY TRIAL JUDGE—DESIGNATION OF  
PARTIES.

Under authority of section 1047 of the Revised Statutes, permitting the amendment of an indictment to correspond with the evidence heard during a criminal trial, the trial judge may, on motion of the district attorney, order a change made in the name in the indictment of both the victim and the person accused of murder, and may order that the trial proceed as if no amendment had been made, if the judge finds that the change is not material to the merits of the case and could not prejudice the defendant; provided, of course, no change shall be made as to the identity of either the person accused or the victim of the crime.

2. CRIMINAL LAW  $\S$  720(9) — TRIAL—ARGUMENT.

When the defendant on trial for murder has testified that he fired two shots, killing two men, it is permissible for the district attorney to argue to the jury that the killing of the two men was evidence of malice on the part of the defendant on trial for the murder of one of them.

Appeal from Seventh Judicial District Court, Parish of Richland; John R. McIntosh, Judge.

Eddie Grimms was convicted of murder, and he appeals. Verdict and sentence affirmed.

W. H. Todd, of Bastrop, for appellant. A. V. Coco, Atty. Gen., and C. J. Ellis, Jr., Dist.

Atty., of Rayville (Vernon A. Coco, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendant appeals from a verdict convicting him of murder, without capital punishment, and from a sentence of imprisonment for life.

Three bills of exception were taken to the rulings of the court allowing the district attorney to amend the bill of indictment, after the jury was impaneled and the taking of testimony was begun. Two amendments were allowed; the first being to change the name of the person accused from that of Eddie Graham to that of Eddie Grimms, and the second being to change the name of the alleged victim from that of Jake Graham to that of Jacob Grimms. When the second amendment was made, the defendant objected to proceeding with the trial because he had not been served with a copy of the amended indictment. His objection was overruled and the fourth bill of exceptions was reserved to the ruling.

[1] The four bills pertaining to the amendment of the indictment may be considered together. All of the objections are disposed of by section 1047 of the Revised Statutes, which provides that, whenever, during a trial on an indictment for any crime, there appears a variance between the indictment and the evidence, with regard to the Christian name or surname, or with regard to both the Christian name and surname, or other description, of any person named or described in the indictment, the trial judge may, if he considers that the variance is not material to the merits of the case and that the defendant cannot be prejudiced by the change, order the indictment amended to correspond with the proof, and that, after any such amendment, the trial shall, if the court so orders, proceed as if no such variance had occurred nor amendment been made.

The defendant did not, and does not now,

dispute that he is the individual referred to in the indictment as Eddie Graham, or that his name is Eddie Grimms. It is not contended that any change was made with reference to the identity of either the person accused or the victim of the homicide. In that respect the case differs from that of *State v. Morgan*, 35 La. Ann. 1139, and others in which it was held that an indictment should not be changed with regard to the identity of a person named therein.

The expression in *State v. Hewitt*, 131 La. 117, 59 South. 35, that the district attorney has authority to amend only bills of information, not bills of indictment, was unnecessary to the decision, and, being contrary to the statute on the subject, must be regarded as an inadvertent expression. A decision directly in point is that of *State v. Matthews*, 111 La. 963, 36 South. 49, where the ruling in *State v. Morgan*, and others of the same import, were held not applicable to an amendment as to the name only—not the identity—of a person referred to in an indictment.

[2] The fifth bill of exceptions was reserved to the statement of the district attorney, in his argument to the jury, that the accused had fired two shots, killing two men. The defendant's objection to the remark was that there was no evidence of the killing of another than the man mentioned in the indictment.

The statement per curiam shows that the defendant stated in his testimony before the jury that he had shot twice, killing two men. It appears also that other witnesses testified that the defendant fired several shots in the double homicide. The district judge ruled that the reference to the firing of more than one shot and the killing of two men was a reasonable and proper argument to show malice on the part of the party accused of the murder of one of the men. We agree with his honor that the argument was only

fair to the state and did no injustice to the defendant.

The remaining two bills of exception were reserved to the overruling of motions in arrest of judgment and for new trial, respectively, which merely renewed the complaints theretofore made. We have found no error in the rulings or proceedings complained of.

The verdict and sentence appealed from are affirmed.

(78 South. 662)

No. 23031.

STATE v. WILLIAMS.

(April 29, 1918.)

(Syllabus by the Court.)

1. WITNESSES  $\S$ 243—LEADING QUESTIONS—TIMID WITNESS.

The rule of evidence forbidding leading questions must yield to the discretion of the trial judge in the examination of a very young or timid witness.

2. INDICTMENT AND INFORMATION  $\S$ 87(2) — SUFFICIENCY—DATE OF OFFENSE.

An indictment should not be held invalid or insufficient for stating incorrectly the date of the alleged crime, if the date or time be not of the essence of the offense.

3. INDICTMENT AND INFORMATION  $\S$ 159(1)—AMENDING INDICTMENT — TRIAL AMENDMENT.

Authority to amend an indictment, where amendment is permissible, is not confined to the grand jury. The trial judge may order an indictment amended during the trial, in the particulars mentioned in the Revised Statutes, on motion of the district attorney.

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW  $\S$ 1170½(3)—EXCEPTION—SUFFICIENCY.

A bill of exception to the overruling of defendant's objection that the district attorney's question to the prosecuting witness was leading was without merit, where the bill did not show that the witness answered.

5. WITNESSES  $\S$ 270(3) — CROSS-EXAMINATION—SCOPE.

Objections to the district attorney's cross-examination of defendant's witness were without merit, where it was as to a matter as to which he had testified for the defense.

Appeal from Fifteenth Judicial District Court, Parish of Beauregard; Winston Overton, Judge.

James Williams was convicted of rape, and he appeals. Verdict and sentence appealed from affirmed.

Robert J. O'Neal and Ped C. Kay, both of De Ridder, for appellant. A. V. Coco, Atty. Gen., and J. Sheldon Toomer, Dist. Atty., of Lake Charles (Vernon A. Coco, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendant, appellant, was convicted and condemned to life imprisonment for the crime of rape.

[1] Bills of exception were taken to the overruling of his objections to the following question propounded by the district attorney to the prosecuting witness, the alleged victim of the crime, viz.: "Did defendant, James Williams, do anything to you at any of the times when he and you were at your mother's house to get your dinner?"

The objections were: First, that the question was leading; second, that the indictment did not show with sufficient certainty whom the defendant was accused of having ravished; and, third, that the answer might accuse the defendant of the commission of a crime on another date than that stated in the indictment, perhaps more than a year before.

The question did not suggest any particular answer, and was therefore not a leading question. If it could be considered suggestive of a particular answer, it would not be objectionable under the circumstances. The witness was less than 12 years of age; and the rule forbidding leading questions is not so rigid that it should not yield somewhat to the discretion of the trial judge in the examination of a very young or timid witness.

There was no merit whatever in the second objection, because the indictment gave the

three names of the alleged victim of the crime, and described her as a female under the age of 12 years.

[2] Referring to the third objection, the statement per curiam shows that the occurrence referred to in the question was on or about the 28th of November, 1917. The indictment charged that the crime was committed on the 1st of December, 1917. It was afterwards amended by changing the date to the 28th of November, 1917, to correspond with the evidence. The testimony of the witness referred to only the one occurrence, on or about the 28th of November, 1917, and therefore did not produce the harm anticipated by the defendant's attorney when he objected to the question.

[3] When the district attorney moved to amend the indictment, the defendant's attorney urged the objections, first, that several witnesses had already testified in the case and that it was therefore too late to amend the indictment, and, second, that only a grand jury could amend an indictment. In overruling the objections, the judge suggested to the defendant's attorney that he would order a mistrial in the case if the attorney could show that the amendment of the indictment was prejudicial to the defense; and thereupon court adjourned for an hour to allow the defendant to make a showing that the amendment of the indictment prejudiced his defense. When court convened, at the end of the hour, the judge asked whether the defendant was ready to make a showing of prejudice to his defense, and his attorney replied that he would proceed with the trial reserving a bill of exceptions to the ruling of the court.

The statements per curiam show that all of the evidence introduced referred to only one crime, and fixed the date either on the 28th of November or on the 1st of December, 1917. The witnesses were not certain or exact about the date of the crime, but fixed it

within a few days from the 28th of November, 1917, if not on that date. The amendment of the indictment therefore was unnecessary and is unimportant. Section 1063 of the Revised Statutes provides that an indictment should not be held illegal or insufficient for stating incorrectly the date of the crime charged, if the date or time be not of the essence of the offense. Hence there was no merit in either of the objections to amending the indictment. Referring to the second objection, however, we may add that the authority to amend an indictment, where amendment is permissible, is not confined to the grand jury. The trial judge may order an indictment amended, in certain respects, on motion of the district attorney. See opinion handed down to-day in *State v. Eddie Grimms*, 78 South. 661, ante, p. 421, No. 23012.

[4] The next bill of exceptions was reserved to the overruling of the defendant's objection that a certain question propounded by the district attorney to the prosecuting witness was a leading question. The record does not show that the witness answered the question. Hence the bill of exceptions has no merit. If the record did disclose the answer of the witness, what we have said on the subject of leading questions with reference to the first bill of exceptions would be also applicable here.

[5] Another bill of exceptions was taken to the overruling of the defendant's objections to a question propounded by the district attorney to a defense witness on cross-examination. The record does not show that the witness answered the question. However, the objections were merely (1) that the district attorney was inquiring about the whereabouts of the defendant at a certain hour two days before the date of the alleged crime, and (2) that the question was irrelevant. There was no merit in the objections because the witness was being cross-

examined upon a matter of which he had testified for the defense.

We have not found any error in the rulings or proceedings complained of.

The verdict and sentence appealed from are affirmed.

(78 South. 663)

No. 22912.

STATE v. JOSEPH.

(April 29, 1918.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §13 — STATUTES §183—LITERAL INTERPRETATION.

In the construction of laws, whether constitutional or statutory, a court is not bound to a literal interpretation, where it would lead to an absurdity or to a plain violation of the spirit and purpose of the enactment.

2. OFFICERS §30—FORFEITURE—CONSTITUTIONAL PROVISIONS.

Article 164 of the Constitution is not to be interpreted as meaning that a citizen, holding a state office, upon whom under the Constitution and laws of the United States, the President, in aid of a great and necessary war, imposes additional duties, forfeits such office by reason of his acceptance of that which it would be unlawful and unpatriotic for him to decline.

3. OFFICERS §30 — VACATION OF OFFICE—ACCEPTANCE OF ANOTHER OFFICE.

A clerk of a district court and ex officio jury commissioner does not vacate those positions by accepting an appointment as a member of a "local board," provided for under Act Cong. May 18, 1917, c. 15, 40 Stat. 76, known as the "Selective Service Act."

4. CRIMINAL LAW §1166(2)—GRAND JURY—FAILURE TO IMPANEL.

The Constitution (article 117) provides that a grand jury shall be impaneled in each parish (except Cameron) twice a year, but it also provides that a grand jury, once impaneled, "shall remain in office until a succeeding grand jury is impaneled"; hence the failure of the judge to impanel a grand jury at the expiration of six months does not, of itself, call for the reversal of a conviction.

5. JURY §64 — GENERAL VENIRE — NUMBER OF NAMES.

The law does not require that 300 names shall be placed at one time in the general ve-



nire box after it is once so filled; the requirement is that the names in the box shall be supplemented from time to time, so as to keep 300 names there from one session of court to another.

Appeal from Sixteenth Judicial District Court, Parish of Evangeline; B. H. Pavy, Judge.

Bye Joseph was convicted of rape, and he appeals. Affirmed.

L. Austin Fontenot, of Opelousas, and J. Hugo Dore and S. W. Gardiner, both of Ville Platte, for appellant. A. V. Coco, Atty. Gen., and R. Lee Garland, Dist. Atty., of Opelousas (Vernon A. Coco, of New Orleans, of counsel), for the State.

#### Statement of the Case.

MONROE, C. J. Defendant, having been indicted on October 6, 1917, for rape, and called for trial, challenged the array of petit jurors on the grounds:

(1) That O. E. Guillory, who participated as clerk of court and ex officio jury commissioner in the drawing of the jurors, had thereafter been appointed a member of the "local board," created by the act of Congress of May 18, 1917, and by his acceptance of that federal office had, ipso facto, vacated the state offices held by him, by reason whereof and of his participation therein the drawing in question was illegal and of no effect.

(2) That in drawing the grand and petit jurors for service in October, 1916, and 1917, the commissioners merely supplemented the names in the general venire box, whereas they should have emptied the box and put in 300 names for the October term of 1917, and their failure so to do operated a legal fraud and injury to defendant.

The challenge was overruled, and defendant, having been tried, convicted, and sentenced, prosecutes this appeal.

#### Opinion.

[1-3] Defendant's counsel invoke article 164 of the Constitution and Act No. 13 of

1912 in support of the ground first above stated as calling for the quashing of the venire. The article reads:

"No member of Congress, nor person holding \* \* \* any office of trust or profit under the United States, or any state, or under any foreign power, shall be eligible as a member of the General Assembly, or hold or exercise any office of trust or profit under the state."

The act is entitled:

"An act to enforce article 170 of the Constitution, \* \* \* declaring that 'no person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace, or notary public,' and providing penalties for the violation of this act."

And it is declared in the text that, with the exception of justices of the peace and notaries public, every person holding an office, whether in the legislative, executive, or judicial branches of the state government, under the parishes or municipalities, or certain state, parish, or municipal boards or institutions, or the United States, or foreign countries, is to be considered an office holder, within the meaning of the act; that no person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace or notary; that any person, who while holding one office shall accept another, shall, "by the very fact of such acceptance of said second office, lose all right, power and authority to exercise the duties or receive the emoluments of the first office" (section 3), shall be conclusively presumed to have vacated said first office, and shall, in the event of such acceptance and of his thereafter exercising the duties and receiving the emoluments of the first office be guilty of a misdemeanor, and, on conviction, be punished by fine and imprisonment.

It had been held by this court, however, that articles of previous Constitutions, practically identical in meaning with article 170 of the Constitution of 1898, were confined in their application to state officers, and did not apply in cases of persons holding, at the

same time, state and municipal offices (*Dorsey v. Vaughan*, 5 La. Ann. 156; *State v. Taylor*, 44 La. Ann. 783, 11 South. 132); and since the passage of the act it has been held, in view of that interpretation of the article mentioned, or its equivalents, that the act is broader than its title, and goes beyond the article that it was intended merely to enforce. *State v. Martin*, 133 La. 1098, 63 South. 598; *State v. Phenix*, 134 La. 329, 64 South. 129.

On the other hand, the jurisprudence is uniform to the effect that the position of jury commissioner is a state "office," and with the possible exception of the case of *State v. Sadler*, 51 La. Ann. 1397,<sup>1</sup> is uniform to the effect that the acceptance of any other state office vacates that of jury commissioner, and vice versa, that the acceptance of the office or jury commissioner vacates any other state office. *State v. Newhouse*, 29 La. Ann. 824; *State v. Arata*, 32 La. Ann. 193; *State v. Dellwood*, 33 La. Ann. 1229; *State v. West*, 33 La. Ann. 1261; *State v. Beard*, 34 La. Ann. 104; *State v. Nockum*, 41 La. Ann. 689, 6 South. 729; *State v. Scott*, 110 La. 369, 34 South. 479; *State v. Bain*, 135 La. 776, 66 South. 196.

If, then, article 170 applies only to state offices, and Act No. 13 of 1912 purports only to carry that article into effect, it is evident that neither the article nor the act have any application in this case, and we therefore revert to article 164, as not only the law which, if there be any, is here applicable, but as that which alone is invoked by defendant. Construing that article literally, as do the learned counsel for defendant, it no doubt furnishes support for their contention, but, as was said by this court in *Landry v. Klopman*, 13 La. Ann. 345, holding that clause 3 of section 2 of article 4 of the Constitution of the United States (which required the delivery of a runaway slave to his owner)

should not be construed as requiring such delivery in the case of a slave who had been arrested, under the law of the state to which he had escaped, and, after due advertisement, sold for the benefit of the owner.

"In the determination of constitutional questions, the same rules of interpretation may be resorted to as with other laws. The duty imposed upon the judiciary to discover the spirit and intention of the lawgiver or the true meaning of the instrument is not less imperative than in case of statutes. It is only a labor of greater delicacy, because \* \* \* the principles involved underlie our social structure, are fundamental, and affect more extensive interests.

"But an adherence to the letter and a violation of the spirit of the instrument ought not to be tolerated or supposed possible."

And the court cites, by way of illustration, the case of a slave who, while a fugitive, may have committed murder, or other high crime, in the state to which he had fled, and who yet must have been given up to his master, according to the letter of the constitutional provision in question.

In the instant case it may well be conceived that article 164 of our Constitution was not framed with reference to the existence of a state of war, when it would become necessary for the federal government, in the exercise of the power conferred and of the obligation imposed upon it by the Constitution of the United States, for the preservation of our system of government and the protection of humanity, to avail itself of all the resources at its command, and an exception must be read into that article and into every article of every state Constitution which may be construed as obstructing the exercise of that power and the discharge of that obligation, for the Constitution of the United States is the paramount law of the land, and it confers upon the Congress the power "to provide for the common defense"; to "declare war"; to "raise and support armies"; "to provide for calling forth the militia to execute the laws of the Union"; "to provide for organizing, arming, and disciplining the

<sup>1</sup> 26 South. 390.

militia and for governing such part of them as may be employed in the service of the United States"; and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Const. U. S. art. 1, § 8. And, in the exercise of the powers so conferred, the Congress has enacted the statute known as the "Selective Service Law," which provides for the conscription of citizens of the country for military service at home and abroad, and the conscription, it may be said, of state officers and citizens for the discharge of certain functions connected therewith, as follows:

"Sec. 4. \* \* \* The President is hereby authorized, in his discretion, to create and establish throughout the several states and subdivisions thereof \* \* \* local boards," etc.

"Sec. 6. \* \* \* The President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several states \* \* \* in the execution of this act, and all officers and agents of the United States and of the several states \* \* \* and all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the Governor or other officer of any state, \* \* \* to perform any duty in the execution of this act, are \* \* \* required to perform such duty as the President shall order or direct," etc.

In the case of *Arver v. U. S.*, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, the Supreme Court of the United States, after an exhaustive consideration of the question of the power of the United States to enforce conscription for military service, disposed of the question of its power to call upon state officials for services to be rendered by them as follows:

"It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions: First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials, because of some administrative features, is too wanting in merit to require further notice."

The question in this case then is should article 164 of our Constitution be interpreted to mean that a citizen, holding a state office, upon whom, under the Constitution and laws of the United States, additional duties are imposed by the President in aid of the raising and maintenance of an army for the prosecution of a great and necessary war, forfeits his office by reason of his acceptance of that which it would be unlawful and unpatriotic for him to decline?

We think not, and are of opinion that, to answer otherwise would be an unwarranted reflection alike upon the intelligence and the patriotism of those by whom the article in question was incorporated in the Constitution.

In that same connection it may be observed that Act No. 135 of 1898 was made a law by a legislative body, which assembled immediately upon the adjournment of the convention by which the Constitution of 1898 was adopted, and was composed largely of members who had been members of that convention. It is a general statute establishing a jury system, and, among other things, provides for the creation of jury commissions as follows:

"Sec. 3. \* \* \* That the several district judges throughout the state, the parish of Orleans excepted, shall select and appoint five discreet citizens and good men and true, able to read and write the English language, who, with the clerk of the district court, or in case of the inability of said clerk to act for any cause his chief deputy, as a member thereof, ex officio, shall constitute a jury commission," etc.

So that, according to a literal interpretation of article 164, the clerks of the district courts have been holding two state offices ever since the Constitution was adopted, and yet, with all its versatility and ingenuity, the bar of the state has never considered that the clerks have forfeited their offices by taking upon themselves the additional burden thus imposed upon them; the reason, no doubt, being that, though the position of

ex officio jury commissioner is, in one sense, an additional office, it is, in another sense, and the sense in which the statute is to be taken, merely an additional burden imposed upon the clerk; and so it may be said with regard to the position of member of the "local board." In one sense, it is an office; in another—the sense of the law authorizing the President to avail himself of the services of a state officer—it represents merely an additional duty which the clerk, as an officer best qualified therefor, is called upon to perform.

We therefore conclude that the ground thus considered—relied on by defendant as supporting his challenge—is not well taken.

[4, 5] 2. Nor is defendant more fortunate with respect to the other ground upon which his challenge was based. It is true that article 117 of the Constitution provides that a grand jury shall be impaneled in each parish (except Cameron) twice a year; but it also provides that the grand jury, once impaneled, "shall remain in office until a succeeding grand jury is impaneled," and we find no requirement, either in the Constitution or the statutes, that 300 names shall be placed in the general venire box at one time after the first occasion. The requirement on that subject is that:

"The commission shall then (certain specified times) supplement the original list and the ballots in the box with the names of the same number of good and competent men \* \* \* as have been taken from the box and erased from the list, so as to keep the number of names in the general venire box and on the jury list at the original standard of 300 contained therein." Act No. 135, § 6, of 1898.

There is no suggestion that there were not 300 names in the box at the opening of the term at which defendant was tried, nor is any prejudice to the defendant, as resulting from the failure of the court to impanel a grand jury twice a year, shown, or attempted to be shown. Unquestionably, the judges should comply with the law, but a failure

so to do in a particular instance, which works no injury to a defendant in a criminal case, does not, necessarily, mean that he is to be discharged.

Finding no error in the rulings complained of, the conviction and sentence appealed from are affirmed.

(78 South. 727)

No. 21286.

BANK OF COTTON VALLEY v. McINNIS  
et al.

(April 1, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by the Court.)

1. CONTRACTS ~~§~~1—STIPULATIONS.

It lies within the power of contracting parties to make any stipulation material to the contract, although such stipulations may seem to be of little or no value to either party intelligently entering into a binding contract.

2. INSURANCE ~~§~~266—FIDELITY INSURANCE—  
CONTRACT—WARRANTIES.

Where parties to a contract of fidelity insurance make certain facts the basis of the contract, the courts will not assume to correct the understanding of the parties as to the materiality of such facts.

3. INSURANCE ~~§~~266—FIDELITY INSURANCE—  
WARRANTIES—AVOIDANCE OF CONTRACT.

Where the parties to such contract have stipulated that a fact is material, the false representation of the existence or nonexistence of any such fact will avoid the contract.

Appeal from Second Judicial District Court, Parish of Webster; J. N. Sandlin, Judge.

Suit by the Bank of Cotton Valley against J. F. McInnis, as principal, and the American Bonding Company and the Fidelity & Deposit Company, as sureties. Judgment for plaintiff, and the sureties appeal. Judgment reversed, and judgment rendered in favor of the sureties, rejecting plaintiff's demand at its cost.

Blanchard & Smith, of Shreveport, for appellants. Roberts & Roberts, of Minden, and Murff & Roberts, of Shreveport, for appellee.

SOMMERVILLE, J. The Bank of Cotton Valley sues J. F. McInnis, its cashier, as principal, and the American Bonding Company and the Fidelity & Deposit Company, as sureties, to recover from the principal, J. F. McInnis, \$5,904.93, and from the sureties, \$5,000, being the total amount of the surety bond carried by the bank with the defendants to indemnify it for any loss it might sustain by larceny or embezzlement committed by J. F. McInnis during the life of the bond, under certain terms and conditions.

The defendants filed exceptions to the citations, which were overruled. Defendants filed each an exception of no cause or right of action, and these two exceptions were, by agreement, referred to the merits.

The substance of defendants' answers is that they owed nothing under the bond; that the many violations of its terms and conditions released them.

There was judgment in favor of plaintiff and against McInnis for \$5,904.93, and against the bonding companies for \$5,000. McInnis has not appealed, and the judgment is final as to him. The bonding companies have appealed, and seek to set aside the judgment.

The original bond was for one year, dated May 15, 1911, and a renewal or continuation certificate provided for under the bond was issued by the bonding company for twelve months more on April 6, 1912. The right to continue the bond in force was given upon the payment of a fixed premium, and upon the application of the employer, which application in the instant case read in part:

"This is to certify that since the issuance of the above bond, Mr. J. F. McInnis, hereinafter called employé, has faithfully, honestly and punctually accounted for all money and property in said employé's control or custody as my or our employé, has always had proper funds or securities on hand, and is not now in default as such employé."

This certificate was signed by the Bank of Cotton Valley by its vice president.

The bond sued upon was issued and accept-

ed upon the following conditions, among others:

"That all statements made, or which may at any time be made by the employer, or any of the officers of the employer, in connection with this bond, or any continuance hereof, are warranted by the employer to be true; that the employé has not been in arrears or in default in any position in the employer's service; \* \* \* that if the employer, or any of the officers of the employer, become aware of the employé gambling, speculating, or committing any disreputable, lewd or unlawful act, the employer shall immediately notify the surety in writing; that the employer shall observe, or cause to be observed, all due or customary supervision over the employé for the prevention of default; that there shall be a careful inspection of the accounts and books of the employé at least once in every twelve months from the date of this bond, and that no act giving rise to a claim hereunder shall be condoned, nor shall any loss hereunder be settled without the written assent of the surety; \* \* \* that as long as the surety and the employer agree so to do this bond may be continued in force from year to year, and in case of such continuance, the surety's liability shall be the same as if this bond had been originally written for the term including the period of such continuance."

The continuation certificate was made to cover "the same position and subject to all the covenants and conditions" of the bond.

This suit was brought during the existence of the continuation certificate.

The evidence shows that McInnis, as cashier of the plaintiff bank, defaulted, and there is a final judgment against him for the amount of said defalcation. This defalcation is alleged by plaintiff in its petition to have taken place "during the life of said original bond and continuation certificate by his fraudulent acts of larceny, embezzlement and other fraudulent acts and false entries on the books of said bank of which he had control," etc.

In its application to the American Bonding Company, the plaintiff bank answered, among others, the following questions:

"Is the applicant now, or has he been from any cause, indebted to the bank, or its officers? If so, state particulars, stating amount, how incurred, and how payment is to be secured. A. No."

"Is applicant now, or about to be, engaged in, or interested in, any other business or employ-

ment than in the bank's service? A. Small insurance business."

"In case of the applicant working as teller, will he be required to balance his accounts daily and report same to his superior officers? A. Yes."

"Will a record of such report be kept? A. Yes."

"In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts, and vouchers, and by whom? A. Loan committee of bank once a month."

"Has applicant always faithfully, honestly, and punctually accounted to you for all moneys and property heretofore under his control and custody as your employé? A. Yes."

"Are applicant's accounts at this date in every respect correct, and proper securities, property, and funds on hand to balance his accounts? A. Yes."

"Are the passbooks of your depositors periodically balanced? A. Yes."

"How often? A. Monthly."

"By what employé of the bank? A. Cashier."

"How many officers and employés are engaged in the active service of the bank? A. One."

At the end of the above questions and answers there is an agreement to this effect:

"It is agreed that the above answers shall be warranties, and form a part and be conditions precedent to the issuance, continuance, or any renewal of or substitution for the bond that may be issued by the American Bonding Company of Baltimore, in favor of the undersigned, upon the person above named."

The foregoing questions and answers have been quoted for the reason that each one in turn has been violated by the plaintiff bank; and, as they, under the agreement, are "warranties," and form parts of and are made conditions precedent to the issuance, continuance or renewal of, or substitution for, the bond, they have the effect of defeating plaintiff's claim for indemnity.

As before stated, plaintiff, in its petition, alleges that McInnis, while acting as cashier of the bank and in the employ of petitioner, did, during the life of the said original bond and continuation certificate, defraud your petitioner out of over \$5,000 by fraudulent acts and false entries on the books of the bank. Yet, in answer to the question propounded at the time of the issuance of the continuation certificate, the officers of

the plaintiff bank answered that McInnis was not indebted to the bank or its officers. Plaintiff seeks to excuse itself on the score of ignorance. But it was its duty to know the condition of the books of the bank, and to know whether McInnis was indebted to the bank or not. The cash of the bank was not balanced daily, as the bank agreed should be done by McInnis. On the contrary, it went many days, sometimes as many as nine days, without being balanced. It was further stipulated that the loan committee of the bank would examine and compare the books, accounts, and vouchers once a month, which was not done. McInnis did not faithfully, honestly, and punctually account to the bank for all moneys and property under his control or custody as employé. The accounts at the date of the continuation certificate, and prior thereto, were not correct; and the property and funds in his hands did not balance his accounts. The passbooks of the depositors of the bank were not balanced monthly. Instead of only one officer or employé being engaged in the active service of the bank, there were several persons, although they were not all employed by the bank. They were in the bank on the invitation of McInnis, and they were discharging the duties of bank clerks to the knowledge of some of the officers of the plaintiff, although, at the time of such service, said officers did not know that the persons referred to were signing and issuing cashier's drafts.

In addition to the small insurance business which plaintiff said McInnis was engaged in with its approval, he was also engaged in the cotton business, to the knowledge of the officers of the bank. The cotton business was clearly speculative, and it had been stipulated in the bond "that if the employer, or any of the officers of the employer, become aware of the employé gambling, speculating, etc., \* \* \* the employer shall immediately notify the surety in writing." This the employer did not do.

[1-3] The statements made by the bank in its application to the bonding company are very material to the contract entered into by it and the defendants, and have very important bearings upon the risk assumed by the latter. They were declared to be warranties, and the nonobservance of those warranties vitiated the contract.

Plaintiff and defendants agreed that the answers to the questions propounded to plaintiff by defendants should be warranties and form parts of and be conditions precedent to the issuance, continuance, or any renewal of, or substitution for, the bond that was issued by the American Bonding Company of Baltimore, in favor of plaintiff.

It lies within the power of contracting parties to make any matter material to the contract, although such matter may seem to be of little or no value to either party to the contract. When the parties themselves have seen fit to make certain facts the basis of a contract of fidelity insurance, the courts will not assume to correct the understanding of the parties as to the materiality of such facts. When the parties have stipulated that a fact is material, the false representation of the existence or nonexistence of any such fact will avoid the contract. *Hunt v. Fidelity & Casualty Co.*, 99 Fed. 242, 39 C. C. A. 496; *Willoughby v. Fidelity, etc., Co.*, 16 Okl. 546, 86 Pac. 56, 8 Ann. Cas. 609.

The case of *Ellzey, Receiver, v. Massachusetts Bonding & Insurance Co.*, 77 South. 642,<sup>1</sup> recently decided, was similar in all respects to the facts of this case, and it was therein held that recovery could not be had on the fidelity insurance bond therein sued on. *Well v. New York Life Insurance Co.*, 47 La. Ann. 1405, 17 South. 853; *Brignac v. Pacific Life Insurance Co.*, 112 La. 574, 36 South. 595, 66 L. R. A. 322; *Bertrand v. Franklin Life Ins. Co.*, 119 La. 423, 44 South. 186; *Winkler Brokerage Co. v. Fidelity &*

*Deposit Co.*, 119 La. 735, 44 South. 449; *Title Guaranty & S. Co. v. Nichols*, 224 U. S. 346, 32 Sup. Ct. 475, 56 L. Ed. 795.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the defendants the American Bonding Company and the Fidelity & Casualty Company of Maryland, rejecting plaintiff's demand at its cost.

O'NIELL, J., concurs in the decree.

(78 South. 729)

No. 23080.

NEW ORLEANS SILICA BRICK CO. v.  
JOHN THATCHER & SON.

In re NEW ORLEANS SILICA BRICK CO.

(April 29, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by Editorial Staff.)

1. MANDAMUS ~~§~~4(3)—NEW TRIAL—CONTROL OF DISCRETION OF TRIAL COURT.

Mandamus will not issue to control the discretion of the trial court in granting new trial; if any error has been made, it can be corrected only on appeal.

2. CERTIORARI ~~§~~5(1)—REMEDY BY APPEAL—GRANT OF NEW TRIAL.

The Supreme Court cannot undertake to review by certiorari the granting of new trials.

Action by the New Orleans Silica Brick Company against John Thatcher & Son, wherein the Globe Indemnity Company answered. Judgment for plaintiff, and to review ruling granting new trial, and to reinstate the judgment, or for trial as between plaintiff and defendants alone, plaintiff applies for writs of certiorari and mandamus. Application dismissed.

P. M. Milner, of New Orleans, for relator. Hall, Monroe & Lemann, of New Orleans, for Globe Indemnity Co.

<sup>1</sup> 142 La. 818.

PROVOSTY, J. The plaintiff company, in order to induce the Globe Indemnity Company to become surety on the bond of Carey & Co., subcontractors in the construction of the Elks' Home in this city, agreed to furnish "all necessary concrete material" and to lend \$1,500 to these subcontractors, and to waive its furnisher's lien against the building. Carey & Co., after having partly carried out their subcontract, defaulted on it; and the defendants, John Thatcher & Son, the principal contractors, completed it at the expense of Carey & Co. For doing so they bought the necessary concrete material from plaintiff. A like quantity of material would have been furnished by plaintiff to Carey & Co., if the latter had not defaulted. However, the material whereof the price is sued for was not furnished to defendants by way of carrying out the agreement to furnish Carey & Co., but independently altogether of that agreement—purely and simply as a sale of material to defendants. Sued in this suit for the price of these materials, defendants admitted owing it, but averred that the Globe Indemnity Company had notified them that they were claiming to be entitled to it, and that therefore the amount should be deposited in court to be litigated over by plaintiff and the Globe Indemnity Company, and that the latter company should be cited for that purpose. The court ordered the deposit to be made and the citation to issue, and the deposit was made. The Globe Indemnity Company answered, claiming the fund, on the theory that the intention of said agreement of plaintiff to furnish materials and money to Carey & Co., and to waive their furnisher's lien, was to contrive and provide that the amounts which would be payable to Carey & Co. under their said subcontract should be available for meeting whatever debts said subcontractors might incur for labor or material in carrying out said subcontract, which debts would operate as liens against said building, and should be covered by said bond, and that this

intention would be defeated if said sum went to plaintiff, for then the amount thus paid by Thatcher & Son would have to be deducted by them from the amount earned by Carey & Co. under their subcontract, and thereby the entire margin available for meeting the laborers' and furnishers' liens, as protection against which the indemnity bond was given, would be absorbed. The further averment is made that the default of Carey & Co. was due to the failure of plaintiff company to carry out its agreement to furnish the materials.

After these answers had been filed, plaintiff moved for judgment on the face of the pleadings, in view of the fact that defendant admitted owing the debt; and judgment was so entered. Within the delays for new trial the court, on the joint motion of defendants and the Globe Indemnity Company granted a new trial.

For asking to be allowed to deposit the fund and to call in the Globe Indemnity Company to litigate over it with plaintiff, the defendants, Thatcher & Son, make substantially the same allegations here recited as having been made by the Globe Indemnity Company; but they fail to allege that they were in any way, shape, or form parties to the said alleged agreement between plaintiff and the Indemnity Company, or bound by it in any way. They do not allege that the materials whereof the price is sued for were furnished in pursuance of, or in execution of, the agreement between plaintiff and Carey & Co. and the Indemnity Company. As the case appears on the face of their answer, the materials were simply purchased by them from plaintiff, and they owe plaintiff for them; and the Globe Company is making claim to the price.

The plaintiff applies for writs of certiorari and mandamus, asking this court to review the ruling by which a new trial was granted, and to order the judgment, which was set aside by the new trial, to be reinstated, or



else to order the trial of the case to be proceeded with as between plaintiff and defendants alone, without the Globe Indemnity Company.

[1] The decision of the issues thus raised is confided by our law to the discretion of the trial court. That discretion cannot be controlled by mandamus.

[2] If any error has been made, the only mode by which it can be corrected is by appeal. This court cannot undertake to review by certiorari the granting of new trials, or, in other words, to try cases piecemeal.

Application dismissed, at the cost of relator.

MONROE, C. J., takes no part.

(78 South. 730)

No. 21349.

# LINCKS v. ILLINOIS CENT. R. CO.

(April 29, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by Editorial Staff.)

## 1. RAILROADS ~~§~~330(2) — CROSSING—WARNING BY FLAGMAN—RELIANCE.

Where a railroad continuously kept a flagman at a crossing where the view of passing trains was obstructed, one who was familiar with such conditions might rely on the flagman's warning.

## 2. RAILROADS ~~§~~348(3)—CROSSING—WARNING BY FLAGMAN—EVIDENCE.

In an action for personal injury when defendant's railroad motorcar struck the buggy in which plaintiff was riding and injured him, evidence held not to show that defendant's flagman had given warning in time to prevent the accident.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by F. W. Lincks against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hunter C. Leake, Lemle & Lemle, and Arthur A. Moreno, all of New Orleans (Blewett Lee and R. V. Fletcher, both of Chicago, Ill.,

of counsel), for appellant. John P. Sullivan, of New Orleans, for appellee.

LECHE, J. Plaintiff prays for judgment in the sum of \$5,000, damages which he claims to have suffered as the result of an injury inflicted upon him by the negligence of the defendant. The accident happened on the 6th of June, 1913, at the intersection of Magnolia and Euphrosine streets in the city of New Orleans. Plaintiff and Capt. Whitaker, of the fire department of the city, were driving to their work along Magnolia street, and as they crossed the railroad tracks of the defendant company, which are laid along Euphrosine street, a motorcar of said company, under the control of its employes, ran into and collided with the buggy in which they were riding, partly wrecked the said buggy, causing plaintiff to be precipitated to the ground and fracturing his arm.

[1, 2] The streets upon which the collision took place are narrow, the buildings are so close to each other and to the street, and obstruct the view to such an extent, that it is impossible for a person riding in a vehicle on Magnolia street, to see a train approaching on Euphrosine street until the vehicle or the train reaches the corner. To guard against the danger of this situation, both thoroughfares being much used, the one for city traffic and the other for moving trains, the railroad company continuously keeps a flagman on duty at the corner, whether or not under compulsion by the city the record fails to disclose. The plaintiff, who was familiar with these conditions, had the right to rely upon the flagman's warning, and the decision of this case hinges upon the disputed fact whether such warning was or was not given in time to prevent the accident. If the testimony offered pro and con be measured by the volume, honors are almost easy between the parties; but as we analyze that testimony, we believe the preponderance is

against the pretensions of defendant and in favor of plaintiff. The flagman and the proprietor of a clothes-pressing establishment who lives near the scene, testify that the flagman shouted a danger warning to the plaintiff and his companion, but we believe from all the testimony that these shouts were uttered too late. It would require clear proof to convince us that two men possessed of ordinary common sense and reason, and who are familiar with such a dangerous situation, would ignore a timely warning and thus recklessly drive across railroad tracks on which trains are run at frequent intervals.

We concur in the finding of the trial judge. The district court awarded plaintiff \$1,000, and the amount is not contested in this court.

The judgment appealed from is affirmed.

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(78 South, 731)

No. 21439.

**NORTHCUT v. JOHNSON.**

(April 1, 1918. Rehearing Denied May 27, 1918.)

*(Syllabus by the Court.)*

**1. SALES §1(4)—SALE OF CATTLE—UNCERTAINTY—NUMBER—WEIGHT.**

An agreement on the part of one party to sell to another 300 head of cattle, or as near that number as the first party could round up and deliver in the time specified, at a fixed price per pound, is not null for uncertainty of the number or weight of the cattle, notwithstanding the agreement was that the second party would accept whatever number of the cattle the first party might succeed in delivering at the scales, in his effort to deliver 300, in the time stipulated.

**2. DAMAGES §81—LIQUIDATED DAMAGES—EARNEST MONEY.**

A payment of \$100 by a party agreeing to buy property by weight, at a price to exceed \$8,000, must be regarded, in the absence of a definite agreement or understanding of the parties as to the purpose of the payment, as a forfeit or giving of earnest, and as fixing the liability or loss that either party might incur by receding from the agreement of sale.

Appeal from Sixteenth Judicial District Court, Parish of Evangeline; B. H. Pavy, Judge.

Action by William P. Northcut against Simon Johnson. Judgment for plaintiff, and defendant appeals. Judgment amended by reducing the amount to \$100, and, as amended, affirmed.

Hundley & Hawthorn, of Alexandria, for appellant. John W. Lewis and Leon S. Haas, both of Opelousas, for appellee.

O'NIELL, J. This is an action for damages for violation of an alleged contract on the part of the defendant to sell to the plaintiff 300 head of cattle, at a stipulated price per pound.

Alleging that he had been deprived of a profit of \$2,700 by the defendant's failure to deliver the cattle, the plaintiff prayed for judgment for that sum. And, alleging that he had paid \$100 of the purchase price, he prayed, in the alternative, that is, in the event the court should hold that the contract was only a promise of sale and a giving of earnest, then that he should have judgment for twice the sum paid.

The defendant, in answer to the suit, admitted that he had agreed to sell to the plaintiff about 300 head of cattle at the price stated per pound, but denied that there was an agreement as to the number or weight or identity of the herd of cattle.

He alleged that the transaction was not a valid contract, because it was subject to the potestative condition that he was to sell only such cattle as he might see fit to deliver. He admitted having received from the plaintiff a check for \$100, but alleged that he had returned it. He prayed that the plaintiff's demand be rejected, and, in the alternative, that is, if the court should hold that he had made a valid promise to sell, and had received earnest money, then that

the plaintiff should have judgment for only \$100.

The plaintiff obtained judgment for \$2,700, from which the defendant appeals.

#### Opinion.

[1] From the admissions in the pleadings and from the testimony, we conclude that the agreement which the defendant failed to comply with was not null for uncertainty of the number or weight or identity of the cattle he promised to sell. The defendant had for sale more than 300 head of cattle, in several herds, at large on the prairie or in the woods. He drove 30 or 40 of them into a pasture, and exhibited them to the plaintiff as a fair sample of all that he had for sale, saying he could round up and would sell and deliver about 300. Having agreed upon the price per pound, the time and place of delivery, and the scales on which the cattle were to be weighed, the plaintiff consented to buy 300 head. The defendant thereupon stated that, as the cattle had to be rounded up and driven a considerable distance to the place where they were to be weighed and delivered, he desired not to be bound to deliver exactly 300 head. His objection was that, in his effort to gather together and deliver the 300 head of cattle in the time specified, he might not be able to get quite that many together, or might gather in a few more than 300. Hence it was agreed that the defendant would deliver at the scales, and the plaintiff would buy at the price stipulated per pound, the 300 head of cattle that the defendant had for sale, or as near that number as the defendant could deliver within the time specified.

Although the understanding and agreement was that the plaintiff would accept whatever number of the cattle the defendant would deliver, in his effort to deliver 300 in the time specified, the agreement was not subject to the potestative condition that the

defendant should deliver only the number that he might see fit to deliver.

Such a contract as the parties made is provided for in article 2458 of the Civil Code, viz.:

"When goods, produce or other objects, are not sold in lump but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery of them, or damages if there be any, in case of non-execution of the contract."

The defendant does not contend that he was unable to deliver the cattle. On the contrary, he admits that he did not attempt to deliver any of them. His reason for declining to carry out his agreement was that he believed he could sell the cattle for a better price; and he thought he would be justified in receding from his agreement for the reasons stated in his answer to this suit, viz.: First, because he was advised and believed that his agreement was null for uncertainty of the number or weight or identity of the cattle he had promised to sell; and, second, because he was advised and believed that, if the transaction was a valid promise to sell, his liability for receding from the promise would be governed by article 2463 of the Civil Code, viz.:

"But, if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise, to wit, he who has given the earnest, by forfeiting it; and he who has received it, by returning the double."

[2] The transaction between the plaintiff and defendant being a contract to sell, by weight, as near 300 head of cattle as the defendant could deliver within the time specified, the plaintiff would have had the option (according to article 2458 of the Civil Code), if earnest money was not paid, either to demand the delivery of the cattle, or to claim damages for violation of the contract. But, if the check for \$100 that he gave to the defendant at the time of the transaction

was earnest money, to be forfeited in case of his failure to carry out the agreement, the defendant's liability for failing to carry out the agreement is limited to the same sum, since he has returned the check.

The defendant testified that the check which he had received from and returned to the plaintiff bore upon its face the memorandum, "Forfeit on about 300 cattle." The plaintiff produced and introduced in evidence on the trial of the case a check bearing the memorandum on its face, "Payment on about 300 cattle." And he testified that it was the same check which he had given to the defendant at the time of the transaction and which had been returned to him. The testimony of the plaintiff, identifying the check, was corroborated by a witness who testified that he saw the plaintiff write the check, and by another witness, who testified that he saw the check when it was taken from the envelope in which the defendant returned it. Both witnesses swore that the word "payment," not "forfeit," was used in the memorandum, "Payment on about 300 cattle."

The defendant and his father-in-law and his attorney swore that they had carefully inspected the check which the defendant had received from the plaintiff, and that the check which the plaintiff introduced in evidence was not the same. The defendant and his attorney testified that when the former consulted the latter as to the liability that might be incurred by receding from the promise of sale, the defendant brought the check to the attorney's office, and they observed and discussed the word "forfeit," in the memorandum on the check, "Forfeit on about 300 cattle." They said that the attorney then advised his client that the word "forfeit" on the check was proof that it was given as earnest, and that, if he receded from his agreement to sell the cattle and returned the check, his liability to the plain-

tiff would be only \$100 if the court should hold that the agreement of sale was a valid contract. The attorney testified that he then had his stenographer to make two copies of the check, and that, when that was done, they compared the copies critically and collated each copy with the original. The attorney testified that he then made a third copy from the original check, using fictitious names in place of those of the maker and payee, and took that copy to the office of another lawyer, whom he consulted as to the liability that might be incurred if the payee of the check should recede from his promise to sell the cattle. The defendant's father-in-law testified that, on the defendant's return from the consultation with his attorney, he called the attention of the witness to the word "forfeit" on the check and explained its significance; and that he (the witness) suggested putting certain marks of identification upon the check, and that he saw the defendant thus mark it and place it into the envelope in which it was returned to the plaintiff. From those circumstances, the defendant and his witnesses testified positively that the memorandum on the check contained the word "forfeit," not "payment." The attorney's stenographer was not present at the trial, but it was admitted that he, a Mr. J. F. Berman, would swear that he made two copies of the check exhibited by the defendant to his attorney, collated them, and compared them with the original; that they were exact copies of the original, and that the two instruments produced by the defendant's attorney and filed in evidence were the identical copies made by him, the stenographer.

The two copies, said to have been made by the stenographer, and that which the defendant's attorney testified he made, all contain the memorandum, "Forfeit on about 300 cattle."

It is quite inconceivable that the defendant, his father-in-law, his attorney, and the

latter's stenographer could have been mistaken in their reading of the word which they deemed so important, on the check that they scrutinized so carefully. The check which the plaintiff introduced in evidence and swore was the original does not bear evidence of an erasure or alteration in the word "payment." It is therefore impossible to believe that the defendant altered the check. In fact, if he had altered it, the instrument produced by the plaintiff would contain the word "forfeit," not "payment." On the other hand, as is suggested on behalf of the defendant, it was possible for the plaintiff to write another check when he received the original from the defendant and observed the word "forfeit" on it. In support of the defendant's theory that the check introduced in evidence by the plaintiff was written after he got back the original from the defendant, our attention is directed to these circumstances: The defendant addressed the letter, in which he returned the check, to the plaintiff's post office address in Texas, and, at the same time, mailed a carbon copy of the letter, addressed to the plaintiff at Opelousas, La., where the plaintiff was awaiting the delivery of the cattle. The carbon copy of the letter was received by the plaintiff in Opelousas, and he consulted his attorney about the matter, several days before the letter containing the check was forwarded to Opelousas. The plaintiff had then told his attorney that the check showed on its face that it was given in part payment for the cattle, and he was advised of the importance of that fact, when he got the check back and saw again the memorandum on it. It appears also that the two witnesses who identified the check produced by the plaintiff at the trial had been interviewed by the plaintiff, and had said that the original check showed on its face that it was given in part payment, before the plaintiff got the check back from the defendant. There is no

reason why the witness who saw the plaintiff write the original check should have observed and remembered that the word "payment," not "forfeit," was used in the memorandum on the check.

However unwilling we are to believe that the check introduced in evidence by the plaintiff is not the same that he gave to the defendant, we are equally reluctant to believe that the defendant and his witnesses committed perjury. As it is quite impossible for them to have been mistaken in their observation of the word "forfeit" on the check, there is a preponderance of the evidence on that question in favor of the defendant.

Avoiding the embarrassing question whether the memorandum on the original check contained the word "payment" or the word "forfeit," we would be convinced, if we should ignore the memorandum on the check, that it was intended to represent, and must be regarded as, earnest money, to have been forfeited in case the plaintiff should have failed in his agreement to buy the cattle. Our reasons for that opinion, aside from any memorandum on the check, are: First, that the amount of the check was such a small proportion of the price intended eventually to be paid; second, that no agreement or demand or suggestion was made for a cash payment on the purchase price; and, third, that the plaintiff's understanding when he voluntarily gave the check, as he admitted in his testimony, was merely that it would "bind the trade." The plaintiff acknowledged in his petition and in his testimony that the total price that he would have paid for the 300 head of cattle at the rate agreed upon would have exceeded \$8,000. A payment of only \$100, to bind a transaction involving \$8,000, must be regarded, in the absence of a definite understanding of the parties as to the purpose of the payment, as a payment of earnest. See *Capo v. Bugdahl*, 117 La. 992, 42 South. 478; *Smith v. Hussey*,

119 La. 32, 43 South. 902; *Legler v. Braughn*, 123 La. 463, 49 South. 22. Our conclusion is that, by giving the check of \$100, the plaintiff fixed at that sum the liability or loss that either party might incur by receding from the agreement.

The judgment appealed from is amended by reducing the amount to \$100, and, as amended, it is affirmed. The defendant is to pay the costs of the district court; the plaintiff to pay the costs of appeal.

(78 South. 734)

No. 22564.

**PISKE v. BROOKLYN COOPERAGE CO.**

(April 29, 1918. Rehearing Denied May 27, 1918.)

*(Syllabus by Editorial Staff.)*

**1. MASTER AND SERVANT §405(1)—EMPLOYERS' LIABILITY ACT—RECOVERY—PROOF.**

Under Employers' Liability Act (Act No. 20 of 1914) § 18, par. 4, holding that the judge in the trying of suits under that act is not bound by the usual common-law or statutory rules of evidence, it is incumbent upon a claimant to prove the facts necessary to sustain his demand and that the accident occurred while the employé was performing services, arising out of and incidental to his employment in the course of his employer's trade, business, or occupation within section 2.

**2. MASTER AND SERVANT §375(1) — WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—TEST.**

It is impossible to formulate an absolute test for determining whether an accident occurred while a workman was acting within the scope of his employment, as no one test can govern all cases, and as each case must be governed by the particular facts.

**3. MASTER AND SERVANT §405(4)—EMPLOYERS' LIABILITY ACT—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT—EVIDENCE.**

In a widow's action for compensation under the Employers' Liability Act for the death of her husband, an employé of a cooperage company, who temporarily went out of the building in which he worked and was killed on the employer's switch track, evidence held to show that the accident did not arise out of and in the course of his employment.

**4. MASTER AND SERVANT §378—EMPLOYERS' LIABILITY ACT—DEFENSES.**

Employers' Liability Act, § 28, withholding compensation for injury caused by the employé's willful intention to injure himself, his intoxication or deliberate failure to use adequate guards, or his deliberate breach of statutory safety regulations, does not exclude all other defenses, and an employer may show that the accident was not one arising out of and in the course of the employment, within section 2.

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Mrs. Annie Piske, widow of August W. Piske, against the Brooklyn Cooperage Company for compensation under the Employers' Liability Act. Judgment for plaintiff, and defendant appeals. Reversed.

Carroll & Carroll and Henry G. McCall, all of New Orleans, for appellant. J. Zach Spearing, of New Orleans, for appellee.

**LECHE, J.** Mrs. Annie Piske, widow of August W. Piske, seeks compensation under the Employers' Liability Act for herself and three minor children, issue of her marriage with her said deceased husband. August W. Piske had been in the employ of the Brooklyn Cooperage Company for several years, and on May 23, 1916, at about 2:30 o'clock in the afternoon, he temporarily left his work, went out of the building in which his occupation required him to be, and was found, by his cries for help, with his right leg pinned under the wheel of a box car, some 40 feet from the building. He was extricated from his position and rushed to a hospital, but his injury proved fatal and he died within a short time thereafter. The accident happened on a switch track used by defendant to ship the output of its factory. There were five empty box cars on the track, and some of the employés of defendant were spotting a loaded car, and as the loaded car came in contact with the standing empties the latter were moved 3 or 4 feet by the jar. Piske was found with his body lying outside the

rails and his leg pinned under the front wheel of the third or fourth car from the end of the string. Whether he was standing between the cars or lying down on the track, and what his purpose was in going there, cannot be explained on any reasonable, or even plausible, theory. Defendant shows that Piske's employment not only did not justify him in going to that particular place, but that his duty at that time required his presence inside the building. No excuse founded on necessity, convenience, or pleasure can be assigned, or even conjectured, why he should have gone on the switch track.

[1] In order to justify recovery by the plaintiff, it must appear that the accident occurred while Piske was "performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation." While the Employers' Liability Act, § 18, par. 4, holds that the judge, in the trial of suits under that act, is not bound by the usual common-law or statutory rules of evidence, it is nevertheless incumbent upon a claimant to prove the facts necessary to sustain his demand, and we cannot conceive of any good reason to hold otherwise. A note at page 1294 of A. & E. Annotated Cases, vol. 40, Ann. Cas. 1916B, lays down the general rule "that the burden of furnishing evidence, from which the inference can be legitimately drawn that an accident to a workman arose out of and in the course of the employment, rests on the claimant." The only burden of proof placed upon the employer is that required to establish the special defenses provided in section 28 of the act. Defendant does not rely upon the defenses mentioned in that section, and therefore that provision of the law has no application in the present case. Admitting that plaintiff has adduced evidence from which the inference can be legitimately drawn that the accident which caused her husband's death arose out of and in the course of his employment, and that

the burden of refuting that inference rests upon the defendant, for the reason that such evidence is more within its control, defendant has fully complied with that duty, and therefore this discussion as to the burden of proof is not a controlling element in the decision of this case.

The questions to be passed upon here are whether Piske at the time he was injured was "performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation," and, if he was not, whether such a defense is tenable under the Employers' Liability Act.

Several decisions from other jurisdictions have been cited by counsel for defendant, and we find many others, from this country and from England, collated in the footnotes to Ann. Cas. 1913C, p. 4, 1914B, p. 498, 1914D, p. 1284, and 1916B, p. 1293.

[2] It would serve no useful purpose to review these numerous decisions, as they each deal with particular facts none of which are identical with those in the present case, and we conclude, like the editors of the note in Ann. Cas. 1916B, p. 1304, that:

"It is impossible to formulate an absolute test for determining whether an accident occurred while the workman was acting within the scope of the employment. Various tests have been stated in the cases on the subject, but no particular test can govern the infinite combination of facts which new cases constantly bring to light. A test laid down in one case is useful, but not conclusive, and, as a general rule, each case must be governed by its particular facts."

[3] Our conclusion from the evidence in this record is that Piske at the time of the accident was not engaged in the performance of any act even remotely connected with his employment.

[4] The other proposition submitted in argument by plaintiff, to the effect that the defenses mentioned in section 28 of the Employers' Liability Act exclude all other de-

fenses, is, in our opinion, not applicable to this case.

Section 28 withholds the benefit of compensation for injury caused (1) by the employé's willful intention to injure himself or to injure another, or (2) by the injured employé's intoxication at the time of the injury, or (3) by the injured employé's deliberate failure to use an adequate guard or protection against accident provided for him, or (4) by the employé's deliberate breach of statutory regulations affecting safety of life or limb. By the terms of section 2, the workman who, under section 28, forfeits the benefit of compensation, is one who receives personal injury by accident arising out of and in the course of such employment. The proof in this case fails to show that the injury suffered by Piske arose out of and in the course of his employment, and consequently fails to show that Piske ever came within the class of claimants entitled to compensation. Piske could not therefore have forfeited that to which he was not originally entitled. In other words, plaintiff argues that the only workmen who are excluded from the benefits of the act are those who, in the language of the act itself, "shall be eliminated \* \* \* for the causes and reasons set forth in section 28." That argument is sound, provided that by the word "workmen" are only meant workmen who were injured by accident arising out of and in the course of their employment, for the act is not intended for the benefit of any other class of workmen; but as Piske was not injured by an accident arising out of and in the course of his employment, the limitation of the defenses provided in section 28 cannot be invoked by his surviving dependents, whose right to claim compensation is derived through him and is no greater than that he could have exercised had he survived his injury.

Believing, then, that the injury which caused the death of Piske did not arise out of and

in the course of his employment, we are compelled to deny the relief prayed for by his dependents.

For these reasons, the judgment appealed from is set aside and reversed, and plaintiff's demand refused, at her costs.

O'NIELL, J., dissents.

(78 South. 735)

No. 21214.

MORGAN'S LOUISIANA & T. R. & S. S. CO.  
v. HIMALAYA PLANTING &  
MFG. CO. et al.

(April 1, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by the Court.)

SALES ~~OF~~ 307—LIEN—RAILROAD IRON—"IMMOVABLE."

Railroad iron, such as rails and angle irons, furnished and used for the construction of a railroad upon a plantation, under a contract with the owner, loses its character as a movable, together with its identity for the purposes of the vendor's privilege, since it enters into and becomes part of a new and distinct thing, which is immovable by nature, and which its withdrawal would destroy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immovable.]

O'Niell, J., dissenting; Leche, J., dissenting in part.

Appeal from Twenty-Seventh Judicial District Court, Parish of Assumption; Charles T. Wortham, Judge.

Suit by the Morgan's Louisiana & Texas Railroad & Steamship Company against the Himalaya Planting & Manufacturing Company, and August Thibault, receiver. From judgment for plaintiff for admitted indebtedness, but rejecting claim of a vendor's privilege, plaintiff appeals. Affirmed.

Beattie & Beattie, of Thibodaux, for appellant. Pugh & Lemann, of Donaldsonville, for appellee.



## Statement of the Case.

MONROE, C. J. Plaintiff brought this suit in October, 1914, alleging an indebtedness by defendant of \$5,030.41, for this, to wit, that, by a contract entered into in the fall of 1911, it agreed to furnish defendant "with railroad iron to build certain railroad tracks on its plantation," the payment for which was to have been made in the spring of 1912; that, pursuant to that agreement, it delivered to defendant material consisting of 112,209 tons of railroad iron, valued at \$2,468, 962 angle bars, worth \$108.02, 16 angle bars, worth \$3.52, which were used by defendant, and are now on its railroad on said plantation; that it furnished defendant one brass "air triple piston, valued at \$1.73"; and, then follow allegations to the effect it furnished labor and material which is not otherwise itemized or described than "as set out" in various statements, "A," "B," etc., said to be annexed to the petition, but which do not appear to have been copied in the transcript for the reason, no doubt, that defendant admitted an indebtedness of \$4,020.56, and plaintiff took judgment for that amount; but, as the judgment rejected its demand for recognition of a vendor's privilege on the railroad iron and material, it has appealed to this court upon that issue.

According to the statement of account, filed by defendant, with its answer, upon which the judgment appears to have been based, plaintiff charged defendant with rails, angle bars, grate bars, labor and material for station and for bridge, loading, trackage, demurrage, coal and other things, and allowed credits for invoice for crating season 1912, 130 cane cars at \$6 per car, \$780, and cash, \$591.18, from which it may reasonably be inferred that the building of the road was a matter in which both parties were interested; plaintiff to get the trackage, and defendant to facilitate the hauling of its cane to the mill. However that may be, the contract

sued on had for its purpose the construction of a railroad on a plantation for the use and improvement of the plantation, and the road, when constructed, became part and parcel of the plantation, not as an immovable by destination, but as an immovable by nature. The Civil Code declares that:

"Art. 462. \* \* \* Immovable things are, in general, such as cannot either move themselves or be removed from one place to another. But this definition, strictly speaking, is applicable only to such things as are immovable by their own nature, and not to such as are so only by the disposition of the law.

"Art. 463. \* \* \* There are things immovable by their nature, others by their destination, and others by the object to which they are applied.

"Art. 464. \* \* \* Lands and buildings or other constructions, whether they have their foundations in the soil or not, are immovable by their nature."

It will hardly be denied that a railroad is a "construction," or that, when constructed, it has its foundations in the soil, as much as, or more than, many plantation buildings, bridges, and fences; nor as we think, can it be successfully denied that, when the bed of such a road has been graded and surfaced, the cross-ties placed in position, the rails laid upon and spiked to the ties, secured or connected, with angle irons and fish plates, and the spaces between the ties filled with ballast, a new and distinct thing is created in which ties, rails, spikes, irons, plates, and ballast lose their character as movables, and their identities, for all the purposes of the vendor's privileges, since such privileges can no more be enforced with respect to its several constituents without destroying the thing into which they have thus been merged than it can be enforced with respect to the canvas upon which a picture has been painted without destroying the picture. The case is, moreover, within the doctrine (as stated in the Matter of Receivership of Augusta Sugar Co., 134 La. 974, 64 South. 870) that, where the things sold are mere materials for the construction or repair of a build-

ing, or of machinery, and are so used, they lose their identity, and become merely a part of such building or machinery, and that, in such case, the vendor's privilege is lost, though there arises a privilege, as of a furnisher of material, upon the structure, as a whole, and upon one acre of ground upon which it stands. Whether the plaintiff now before the court could, at this time, successfully assert a privilege as furnisher of material, we are not called on to inquire.

The judgment appealed from is therefore affirmed.

O'NIELL, J., being of the opinion that the railroad iron could be removed without destroying or injuring the remaining property, dissents from the refusal to recognize the vendor's lien.

LECHE, J. (dissenting in part). I concur in the decree for the reason that the balance of account sued for is as much for labor and other items as for rails, and therefore is not secured by vendor's privilege on the rails, as it does not represent exclusively the price of rails; but I dissent from the proposition that a plantation owner may defeat a vendor's privilege on rails by incorporating the rails into a railroad which he builds on his plantation, as that is in conflict with what I believe to be settled jurisprudence.

(78 South. 737)

No. 22999.

STATE v. MAGGIORE et al.

(April 29, 1918.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION  $\S$  121(2)—INTOXICATING LIQUORS  $\S$  143—KEEPING "BLIND TIGER"—ELEMENTS OF OFFENSE—STATUTE.

The ingredients of the offense of keeping a "blind tiger," as defined by Act No. 8 (Ex. Sess.) of 1915,  $\S$  1, are the keeping of a place in pro-

hibition territory where spirituous, malt, or intoxicating liquors are kept for sale, barter, exchange, or habitual giving away, or for sale, barter, exchange, or habitual giving away in connection with any business conducted at such place; and, where the ingredients specified in the first clause are set out in a bill of information, the defendant is not entitled to a bill of particulars explaining that it is not intended to charge him with the commission of the offense in any other capacity than as so alleged, or with keeping such liquors for such purposes in connection with any business conducted at such place, or specifying the particular brands of liquors with the keeping of the place for the sale, barter, etc., of which he is charged. The gist of the offense consists of the keeping of a "blind tiger," and a bill of information which fully informs a defendant of the ingredients of that offense furnishes him with all the information needed for the preparation of his defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Blind Tiger.]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW  $\S$  1128(2)—APPEAL—REVIEW—MATTER NOT IN RECORD.

Where defendant filed in the Supreme Court a purported certified copy of an internal revenue license paid by him, and alleged to have been offered at the trial, it could not be considered where not referred to in transcript.

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Jerry Cline, Judge.

Felix Magglore and others were convicted of keeping a blind tiger, and they except and appeal. Affirmed.

David R. Rosenthal, of Lake Charles, for appellants. A. V. Coco, Atty. Gen., J. Sheldon Toomer, Dist. Atty., of Lake Charles, and W. A. White, Asst. Dist. Atty., of Covington (Vernon A. Coco, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendant, having been convicted upon a charge of keeping a blind tiger, presents his case to this court upon a bill of exceptions reserved to the refusal of the trial court to order the prosecution to file a bill of particulars setting forth whether he was to be prosecuted as owner, partner, or agent, the kind of liquor he was charged

with handling, and whether it was for sale, barter, exchange, or giving away.

The bill of information reads, in part, as follows:

"That Felix Maggiore and Bob Delovisio, \* \* \* on the 1st day of June, 1917, and upon each and every day thereafter up to and including the 21st day of January, 1918, did unlawfully keep and operate a 'blind tiger,' being a place where spirituous, malt, and intoxicating liquors were kept for sale, barter, exchange, and habitual giving away, at a house situate at a place west of the Kayouche Coulée, north of Broad street road, south of the Southern Pacific Railroad and each (east) of the corporate limits of the city of Lake Charles, La., known as the 'Old Gray Place,' in Calcasieu parish, \* \* \* being a subdivision of the state of Louisiana, wherein the sale and retailing of malt and intoxicating liquors is prohibited by law," etc.

[1, 2] The charge appears to have been brought under so much of Act No. 8 of 1915 (E. S.) as reads:

"Section 1. \* \* \* That a 'blind tiger' is hereby defined to be any place in those subdivisions of the state where the sale of spirituous, malt or intoxicating liquors is prohibited, where such spirituous, malt or intoxicating liquors are kept for sale, barter, or exchange or habitual giving away; or [defining a somewhat different offense, with which defendant is not charged] any place, in those subdivisions of the state where the sale of spirituous, malt or intoxicating liquors is prohibited, where such spirituous, malt or intoxicating liquors are kept for sale, barter, exchange, or habitual giving away in connection with any business conducted at such place.

"Sec. 2. \* \* \* That the keeping of a 'blind tiger' is hereby prohibited, and whoever shall be guilty of violating this act shall be guilty of misdemeanor.

"Sec. 4. \* \* \* That whoever shall be found guilty of keeping a 'blind tiger,' in violation of this act, shall be fined," etc.

The trial judge declined to order the bill of particulars to be furnished, on the ground that the charge, as made, is sufficiently specific to enable defendant to prepare his defense.

"The offense charged (says the learned judge) is completed by the keeping of a place for the unlawful disposition of intoxicating liquors; no actual transaction need be established, and therefore the charge is suffi-

ciently specific of the unlawful purpose set out," etc.

We find no prejudicial error in that ruling. A defendant in a criminal prosecution is not entitled to a bill of particulars as a matter of right, but only where the charge is so general as not to enable him to prepare his defense, and the determination of that question is largely within the discretion of the trial judge. *Marr's Cr. Jur. of La.* p. 433. As the statute here in question makes it an offense to keep a place in prohibition territory where any brand of spirituous, malt, or intoxicating liquor is kept, either for sale, barter, exchange, or habitual giving away, and as defendant is charged, conjunctively, with keeping a place so situated where spirituous, malt, and intoxicating liquors were kept for sale, barter, exchange, and habitual giving away, it was unnecessary, in order to put him on his defense, to explain that it was not intended to charge him with the commission of that offense in any other capacity than as so alleged, or with the offense of keeping such liquors for such purposes "in connection with any business conducted at such place," or to specify the particular brand or brands of spirituous, malt, and intoxicating liquors with the keeping of the place (in prohibition territory) for the sale, barter, exchange, and habitual giving away of which he was charged.

The gist of the offense consists of the keeping of a "blind tiger," and its ingredients are set forth in the bill of information and fully informed defendant of all that he needed in order properly to defend himself. *State v. Jackson*, 135 La. 365, 65 South. 491; *State v. Barnette*, 138 La. 693, 70 South. 614; *State v. Garland*, 140 La. 402, 73 South. 246; *State v. Selsor*, 140 La. 469, 73 South. 270; *State v. Ferris*, 76 South. 608;<sup>1</sup> 8 Corpus Juris, p. 1124, notes.

<sup>1</sup> 142 La. 128.

In *State v. Nejin*, 140 La. 37, 72 South. 801, as in case of *State v. Barnette*, supra, the charge was held to be insufficient because framed in the disjunctive.

[2] Counsel for defendant has caused to be filed in this court what purports to be a copy, certified by the clerk of the district court, of an internal revenue license, said to have been paid by defendant, and to have been offered in evidence on the trial, but we find no reference to it in the transcript, whether by way of bill of exception or otherwise, and can give it no consideration.

Judgment affirmed.

(78 South. 738)

No. 22703.

**ILLINOIS CENT. R. CO. v. NEW ORLEANS  
TERMINAL CO.**

In re NEW ORLEANS TERMINAL CO.

(April 29, 1918. Rehearing Denied May 27, 1918.)

*(Syllabus by Editorial Staff.)*

**1. RAILROADS §138—OPERATION—CONTRACT  
FOR MOVEMENT OF TRAINS.**

A contract between a railroad company and a terminal company, whereby the terminal company undertook to provide for the movement of trains, obligated the terminal company to provide for their safe movement.

**2. RAILROADS §138—OPERATION—MOVE-  
MENT OF TRAINS—RESPONSIBILITY.**

A terminal company, which, by contract with a railroad company, reserved exclusively to itself the function to provide for the safe movement of trains, assumed exclusive responsibility for nondischarge of such function.

**3. PLEADING §228—EXCEPTION—DETERMI-  
NATION FROM ALLEGATIONS.**

The exception to the petition of no cause of action must be determined from the facts as alleged.

**4. PLEADING §34(4)—EXCEPTION—CON-  
STRUCTION AGAINST PLEADER.**

As against an exception of no cause of action, the petition must be construed most strongly against the pleader.

**5. PLEADING §34(5)—EFFECT OF ALLEGA-  
TIONS.**

In a railroad's action against a terminal company for damages sustained through head-on collision of two trains, the petition's allegation that the collision was due entirely to the action of defendant's employes was equivalent to an allegation that it was not by the orders of the train dispatcher, a joint employe of the parties, that the guilty train was on the wrong track.

**6. LIMITATION OF ACTIONS §21(1)—PRE-  
SCRIPTION—BREACH OF CONTRACT—COMMIS-  
SION OF TORT.**

Where a terminal company, obligated by its contract with a railroad company to provide for the safe movement of trains, through its employes ran a train into a train of the railroad company, it was liable for breach of contract, though its act constituted a tort, for a contractor cannot destroy the obligation of his contract by committing a tort, and limitations of one year, relating to tort, was not applicable where action was grounded on contract.

**7. DAMAGES §20, 23—CONTRACT AND TORT.**

For breach of contract without fault or bad faith, only those damages in the contemplation of the parties when making the contract may be recovered, but for a tort all damages resulting directly from the act or negligence may be recovered.

**8. RAILROADS §137—CONTRACT—CONSTRUC-  
TION—ABSORPTION OF BREACH IN TORT.**

The provision of a contract between a railroad company and a terminal company, obligating the terminal company to make good any losses occasioned entirely through the fault of its own employes, offended neither prohibitory law nor good morals, and would prevent absorption of a breach of the contract in a tort.

Leche, J., dissenting.

Certiorari to Court of Appeal, Parish of Orleans.

Suit by the Illinois Central Railroad Company against the New Orleans Terminal Company. From a judgment of dismissal, plaintiff appealed to the Court of Appeal, which reversed the judgment and remanded the case with leave to plaintiff to amend, and defendant applies for certiorari or writ of review. Judgment of the Court of Appeal affirmed, in so far as it sets aside the judgment of the trial court, and overrules exceptions of no cause of action and prescription of one year, and set aside in so far as

it requires the petition to be amended and case remanded to the district court.

Hall, Monroe & Lemann, of New Orleans, for relator. Hunter C. Leake and Lemle & Lemle, all of New Orleans (Blewett Lee and R. V. Fletcher, both of Chicago, Ill., of counsel), for respondent.

**PROVOSTY, J.** The plaintiff railroad company entered into a contract with the defendant railroad company for the use of the latter's terminal tracks. A head-on collision occurred between one of the freight trains of the plaintiff company and a train of the defendant company running in opposite directions on the same track; and plaintiff sues in damages. Only the following clauses of the said contract need to be considered:

That the defendant company "shall have control of operations on said railroad and tracks, and shall provide for the movement of the cars and engines of the other parties hereto over said railroad and tracks, and to those ends shall furnish the services of all such train dispatchers, operators, signalmen, yardmen, trackmen, laborers, or other persons whose services may be necessary in the premises."

That "the crews and employés" of the several parties to the contract, "while operating trains and engines upon said railroad and tracks shall at all times be subject to the orders and directions of the superintendent and other proper officers of the terminal company."

"12. That all superintendents, foremen, train dispatchers, operators, signalmen, switchmen, yardmen, or other employés of the Terminal Company, employed in or about the operation, maintenance or care of the properties jointly used hereunder, shall, for the purposes of this agreement, be considered as the sole employés of that one of the parties hereto for which they may at any time perform a service, or services, the benefit or other result of which shall accrue to such party solely, and as joint employés of any two or more of the parties hereto while performing a service, or services, the benefit or other result of which shall accrue to such two or more parties hereto.

"13. That the responsibility of the parties hereto, as between themselves, for the defense or payment of any and all claims, demands, suits, judgments or sums of money to any party accruing for loss, injury, death or damage, however resulting, either to person or estate, and arising by reason of or in connection with the joint use by the parties hereto of the said

facilities to be jointly used hereunder, as aforesaid, or which may be attributable to the acts, negligence or default of any person or persons employed by the parties hereto, or any of them, in or about the operation or maintenance or care of said facilities, shall be distributed as follows:

"(a) When the proximate cause of any such damage shall be the negligence of any one who may at the time be employed in the sole service and for the sole benefit of any party using these facilities, or defects in the equipment in its possession, without contribution to such negligence by any employés of any other party hereto, then that one of the parties hereto whose employés, as so defined, shall be at fault, or who shall have had in its possession equipment the defects in which shall have caused the damage as above, shall be responsible for such loss or damage.

"(b) When the proximate cause of any such damage shall be negligence to which employés of two or more of the parties hereto shall have contributed, or the negligence of a joint employé, acting simultaneously for two or more parties, then each of the parties whose employés have been at fault, or in whose service such joint employé may have been acting at the time, shall be so responsible for and shall bear all loss incident to any injury to or damage of its own property, including foreign equipment in use by it."

[1] Contractual liability on the part of defendant results from two clauses of this contract: First, from the clause by which the defendant undertakes to provide for the movement of the trains, which, of course, can only mean the safe movement; and, secondly, from the clause which obligates that one of the parties for whose benefit services are being rendered to make good the losses occasioned by the fault of the employés rendering the services.

[2] Defendant excluded the plaintiff company from all participation in the "control of operations on said railroad and tracks," and took that function exclusively upon itself, and obligated itself to discharge it, or, in the words of the contract, to "provide for the movement of the cars and engines of the parties hereto over said railroad and tracks, and to that end to furnish the services of all" such employés "as may be necessary in the premises." To "provide for the movement" of the trains, necessarily means to provide

for their safe movement; and, necessarily, by reserving that function exclusively to itself defendant, assumed exclusive responsibility for its nondischarge. It stands to reason that plaintiff, being excluded from all participation in that function, could not be responsible in any degree for its nondischarge, or for any loss resulting therefrom. Indeed, the fact that this responsibility would have necessarily to rest upon some one, and would, as an effect of said exclusive assumption, rest wholly upon defendant in the absence of contrary express agreement, was fully realized by the parties, and evidently was what led to the insertion of the said clauses 12 and 13, according to which that responsibility is regulated by providing that the employes are to be considered to be the joint employes of the two parties when the services that are being rendered by them are for joint interest, and the separate employes of that one of the parties for whose separate benefit the services are being rendered, and that the responsibility for the faults of these employes while engaged in said services is to be governed accordingly. The services of the employes by whose fault the collision occurred were being rendered solely for the benefit of the defendant company; and thus defendant, instead of providing for the safe movement of the train of plaintiff, rammed it with another train.

Defendant contends that the collision resulted from the fault of the train dispatcher, and that this official was the joint employe of the two companies; and that therefore the plaintiff's petition shows no cause of action, in view of the express terms of clause 13(b).

[3-5] This exception of no cause of action has, of course, to be determined from the facts as alleged in the petition; and we do not think that from the facts as alleged the conclusion can be legitimately drawn that

the train dispatcher was the joint agent of the parties. While the petition is not as explicit on that point as it might have been made, it is sufficiently so, we think, even when construed most strongly against the pleader, as must be done. It alleges that the tracks in question are two in number: one exclusively for traffic southbound; and the other exclusively for traffic northbound; that plaintiff's train was properly on the track it was on, and by orders of the train dispatcher, whereas the other train was improperly on the same track; and that "the said collision was due entirely to the action of the said defendant's employes." Now, if the guilty train had been on this wrong track by the orders of the train dispatcher, and this official had been the joint employe of the parties, the collision could not have been due "entirely to the action of the defendant's employes," but would have been due to the action of the joint employe of the parties. Therefore the said allegation that the collision was due entirely to the action of defendant's employes is equivalent to an allegation that it was not by the orders of the train dispatcher that the guilty train was on this wrong track.

We are assuming here that the defendant is well founded in the contention that the train dispatcher would have been the joint agent of the parties if it had been by his orders that the guilty train was on the wrong track. Whether he would have been such is a question that can come up only after the fact of the guilty train having been there by his orders shall have been established, and that fact, we find, does not appear by the petition; but, on the contrary, is negated by the petition taken as a whole. Our said assumption, therefore, is thus made merely for argument, and not by way of expressing an opinion on said question.

[8, 7] Another contention of defendant is that if plaintiff has a cause of action, it is

in tort, and that the action is prescribed, more than one year having elapsed between the date of the collision and that of the filing of the suit. There is no doubt that the action of the defendant, through its said employes in running this other train into that of the plaintiff, amounted to a tort; but there is no reason why the breach of a contract by means of a tort should not furnish ground for an action for breach of contract. A contractor cannot liberate himself from his contract, or, in other words, destroy its obligation, by committing a tort; and if the obligation is not destroyed, but remains in full force, and the contract is breached, there is evidently a ground of action on the contract. Because a certain act of omission or commission violates the general duty which a person owes to society not to injure another is no reason why it should not, at the same time, violate a special duty owing to this other by virtue of a contract to do or not to do that particular thing, and why the violation of the latter duty should not furnish a cause of action. The measure of damages may be different for the injury caused by an act accordingly as the act is viewed as a breach of contract or as a tort; and, clearly, the party injured should be entitled to the one or the other action accordingly as his interest may dictate. For breach of contract without fraud or bad faith only those damages which entered into the contemplation of the parties at the time of making the contract may be recovered. Whereas for tort all and whatever damages resulting directly from the act or negligence complained of may be recovered.

The illustration given in the brief of the learned counsel for defendant of a man who, having a house with a hall in the middle, leases one side, with privilege of using the hall, and thereafter assaults his lessee in this hall, has no analogy; for this lessor never undertook by his contract not to as-

sault the lessee in his hall or to protect the lessee against the attempt by any one else to do it. But if, instead of assaulting the lessee, he caused him to fall and be injured by wrecking the floor of the hall, or otherwise making the hall unsafe for use, there would be an analogy; for the maintenance of the hall in a safe condition for use would have been part of his contract. In the latter case, however, he would be liable both for breach of contract and tort.

The decisions cited by the learned counsel contain nothing opposed to the ideas which we have hereinabove expressed.

What the court held in *Schoppel v. Daly*, 112 La. 201, 36 South. 322, was simply that "the existence of contractual relations between two parties is no bar to a right of action for tort committed pending the contract, and connected with it, though the contract may more or less affect the rights \* \* \* of the parties." This, it seems to us, accords perfectly with what we have said hereinabove. The intention of the court certainly was not to express the idea that the breach of a contract by means of a tort may not furnish ground for both an action on contract and an action in tort, for the court cites in support of that statement *Ballew v. Andrus's Executor*, 10 La. 216, where the court said:

"Conventional obligations may be superadded to those which result from torts, \* \* \* and a party in whose favor they accrue may choose between them and resort to either remedy."

In *Dave v. M. L. & T. R. R. Co.*, 46 La. Ann. 273, 14 South. 911, the action was clearly in tort; and all that the court did was to hold that it was of that character. The court did not hold that the same act of defendant would not have furnished ground for an action on contract. The case was that of a passenger negligently carried beyond his station, and then without excuse roughly ejected from the train. No one, we hope,

would say that a passenger, negligently carried beyond his station and then unceremoniously ejected, has not a right of action on contract.

And the same may be said of *King v. N. O. Ry. & L. Co.*, 140 La. 843, 74 South. 168, as to the character of the action. The act complained of was the intempestive or premature starting of a street car from which the plaintiff was in the act of stepping off. Here, again, the court did not hold that plaintiff could not have sued on contract, but merely that, as a matter of fact, plaintiff was suing in tort.

[7] And what we have here said of *King v. R. R. Co.* applies equally to *McGinn v. Railroad Co.*, 118 La. 811, 43 South. 40, 8 L. R. A. (N. S.) 1120, 10 Ann. Cas. 633. All these cases are founded upon common law, and there cannot be any disputing that: for the breach of the contract of carriage by means of a tort, the passenger may at common law bring either action, at his choice.

"In an action by a passenger against a carrier, the usual rule applies that when a duty is imposed by law by reason of the relation of the parties, although such relation was created by contract, a neglect to perform the duty gives the party a right of action, and he may elect to sue upon the contract or bring an action *ex delicto*; and it is well settled that a passenger, injured through the negligence or carelessness of the carrier, may proceed either upon the contract or proceed in tort." 5 *Ruling Case Law*, p. 63, par. 702.

The following excerpt from *Fuzier-Herman, Repertoire du Droit Français, Vo. Responsabilité, No. 4*, expounds the legal situation very clearly:

"Certain authors do not admit any distinction between contractual and tortious liability. According to them there is no duality but unity in the fault. The difference pretended to be established between the two kinds of fault, lacks all foundation; it is but a kind of illusion resulting from a mere superficial examination. The one and the other fault creates equally an obligation, that of repairing the damage that has been done: the one and the other presuppose equally the existence of a prior obligation; the one and the other consist equally in a fact which constitutes a violation of this obli-

gation. Only in what is commonly called a tort the violated obligation is one arising by operation of law, having for its object a negative fact, an abstention. If the idea is to speak of a distinction to be made in practice between contractual and legal obligations, perhaps some dispositions of positive law may be found which will impart an interest to that distinction; but if the idea is to establish a specific distinction between faults from a point of view purely rational and doctrinal, the commonly accepted distinction is not contestable merely; it is without sense or reason."

[8] But even if, as a general proposition, the tort absorbs the breach of contract, so that the latter no longer exists as a ground of action, this absorption could not be allowed to take place in the present case; for by the express terms of the contract of the parties—clause 13 (a)—it has been provided otherwise; and, as this provision offends against neither a prohibitory law nor good morals, there could be no reason for not enforcing it as agreed to. Defendant by this clause expressly obligates itself to make good any losses that may be occasioned entirely through the fault of its own employés.

Cases strongly illustrative of a contractual obligation not merging in, or being absorbed by, a concurrent obligation in tort are those of *Semple v. Buhler*, 6 Mart. (N. S.) 665, and *State v. Winfree*, 12 La. Ann. 643, where the same act is held to give ground to an action in tort against a sheriff and in contract against his bondsmen; and *Levasseur v. Gardner*, 34 La. Ann. 264, where for the tort committed by an attachment a suit on the attachment bond is held to be on contract.

Our Brethren of the Court of Appeal were of the opinion that the petition showed a cause of action, and that the suit was on contract, but thought the petition ought to be amended so as to make clear, or explicit, the allegation that it was not by the orders of the train dispatcher that the culprit train was where it was; and they remanded the case for said amendment to be made. Our view, as already stated, is that, while the petition might have been made more explicit



in that regard, its allegations, taken as a whole, are sufficient.

The judgment of the Court of Appeal is therefore affirmed in so far as it sets aside the judgment of the district court and overrules the exceptions of no cause of action and prescription of one year; and it is set aside in so far as it requires the petition to be amended, and the case is remanded to the district court to be proceeded with according to law; the defendant company to pay the costs of this court and of the appeal.

MONROE, C. J., takes no part. LECHE, J., dissents.

(78 South. 741)

No. 23008.

VANCE v. NOEL et al.

(April 29, 1918. Rehearing Denied May 27, 1918.)

(*Syllabus by the Court.*)

1. COVENANTS  $\S$  88—DISTURBANCE IN POSSESSION—REMEDY.

Owners of real property who are disturbed in possession thereof may call their vendors in warranty.

2. COVENANTS  $\S$  88 — BREACH — CALL IN WARRANTY.

Although a partition proceeding may be summary, the defendant has a right to call his vendors in warranty when his possession of the entire property is disturbed.

3. APPEAL AND ERROR  $\S$  1178(1)—DISPOSITION OF CASE — STRIKING CALL IN WARRANTY.

An interlocutory order striking the call in warranty made by the defendants from the record will be set aside, and the case will be remanded for trial.

(*Additional Syllabus by Editorial Staff.*)

4. APPEAL AND ERROR  $\S$  70(1) — APPEAL FROM INTERLOCUTORY ORDER—TIME.

Defendant's appeal from an interlocutory order, striking the call in warranty from the record, taken at the termination of the suit, was taken at the proper time.

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Suit for partition by Samuel W. Vance, curator of James Washington Vance, an interdict, against W. E. Noel, Jr., and others, in which defendants called W. F. Taylor Company, Incorporated, in warranty. Judgment for plaintiff, and from an order dismissing the call in warranty and overruling exceptions of no cause of action, etc., defendants appeal. Judgment reversed that the call in warranty be reinstated and that the suit proceed in accordance with law.

Herndon & Herndon, of Shreveport, for appellants. Barret & Files, of Shreveport, for appellee.

SOMMERVILLE, J. Samuel W. Vance, the curator of his brother, James Washington Vance, an interdict, brought this partition suit against the defendants, alleging that his ward and the defendants were owners in indivision of the property described in the petition, and he asked that the same be partitioned in kind. The defendants answered, denying part ownership in the plaintiff, and also part ownership by themselves; but in a subsequent paragraph they "aver that your respondents acquired said property for a valuable consideration from the W. F. Taylor Company, Incorporated, which will more fully appear by reference to a deed recorded in the recorder's office of Caddo parish, La.," and they asked that W. F. Taylor Company, Incorporated, be called in warranty to defend the suit. The validity of plaintiff's and defendants' titles were put at issue.

The plaintiff, alleging "that this is a summary proceeding, and that defendants had no right or authority to make the call in warranty herein, move the court to strike the same from the answer herein, and that the order allowing same be recalled and rescinded." The order to strike out was granted.

There was judgment in favor of plaintiffs,

ordering the partition prayed for, and defendants have appealed from the order dismissing the call in warranty, on the ruling of the court overruling their exception of no cause of action, and from the ruling of the court admitting a certain document in evidence.

[1, 2] Partition suits are to be tried in a summary manner. By "summary" "is always meant with the least possible delay and in preference to the ordinary suits pending before" the judge. Civ. Code, art. 1328. But the law does not say or mean that a defendant shall be deprived of any of his rights in summary proceedings.

The Civil Code provides (article 2517):

"The purchaser threatened with eviction, who wishes to preserve his right of warranty against his vendor, should notify the latter in time of the interference which he has experienced.

"This notification is usually given by calling in the vendor to defend the action which has been instituted against the purchaser."

And article 2518 provides that:

"In the absence of this notification, or if it has not been made within due time, that is, in time for the vendor to defend himself, the warranty is lost; provided, however, that the vendor shall show that he possessed proofs, which would have occasioned the rejection of the demand, and which have not been employed, because he was not summoned in time."

It was therefore defendants' privilege, as well as their duty, to notify their vendor and to call upon it to defend the action which had been instituted against them by this plaintiff.

Such call in warranty could not have had the effect of depriving plaintiff of what the law terms a summary trial of his partition suit.

[3] The Code of Practice, in article 165, par. 4, says:

"In matters relative to warranty, they must be carried before the court having cognizance of the principal action in which demands in warranty arise."

And, these demands in warranty must be disposed of at the time when the suit is disposed of on its merits.

It was error, therefore, in the trial judge to strike out the call in warranty filed by defendant and to proceed with the trial of the cause in the absence of the warrantor duly notified and cited, and the case will have to be remanded for a new trial. The warrantor has not appealed from the judgment. It appears to be satisfied with the order dismissing it from the suit. But the defendants have appealed, by motion, in open court, and all parties were made appellees who are not appellants.

[4] The order striking the call in warranty from the record was an interlocutory order, and the defendants' appeal therefrom at the termination of the suit was taken at the proper time.

There was judgment in favor of plaintiff and against defendants on the merits of the case, from which judgment defendants have appealed. Inasmuch as the ruling of the court has deprived defendants of the defense, or defenses, which their warrantor might have successfully made to the suit, the judgment will have to be reversed in its entirety.

It is therefore ordered, adjudged, and decreed that the judgment appealed from herein, be annulled, avoided, and reversed, that the call in warranty made by defendants be reinstated, and that this suit be proceeded with in accordance with law.

Costs of appeal to be paid by plaintiff.

(78 South. 742)

No. 23071.

## STATE v. CLARK.

(April 29, 1918. Rehearing Denied May 27, 1918.)

*(Syllabus by the Court.)*1. CERTIORARI  $\S$ 14—PROHIBITION  $\S$ 5(2)—ACTION OF JUDGE OF JUVENILE COURT.

A writ of certiorari and prohibition will not issue to the judge of the juvenile court, where it appears that defendant has been ordered to pay alimony to his child, to furnish a guaranty, or conditional, bond, and, in default of furnishing said bond, to be held for further proceedings and orders of the court.

*(Additional Syllabus by Editorial Staff.)*2. PARENT AND CHILD  $\S$ 17(1)—NONSUPPORT—ORDER OF COURT—JURISDICTION.

Where a parent was convicted of failing to support his minor child, and ordered to pay a certain amount per month for its support, the juvenile court's order that a guaranty, or conditional, bond, be furnished by defendant did not exceed its authority.

3. CRIMINAL LAW  $\S$ 1213—CRUEL AND UNUSUAL PUNISHMENT.

The juvenile court, in ordering that defendant, in default of furnishing a guaranty bond to pay a certain sum per month for the support of his child, be held for further proceedings and orders of the court, did not impose a cruel and unusual punishment, or condemn defendant to perpetual punishment.

4. CERTIORARI  $\S$ 3—PROHIBITION  $\S$ 3(1)—EXHAUSTION OF REMEDIES IN TRIAL COURT.

Relator should have exhausted his remedies for relief in the trial court before obtaining writs of certiorari and prohibition against the judge of the juvenile court, ordering him to give a guaranty bond to pay a monthly sum for the support of his child, and in default of furnishing such bond to be held for further orders of the court, and committing him.

5. PARENT AND CHILD  $\S$ 17(8)—ORDER TO PAY ALIMONY FOR SUPPORT OF CHILD—APPEAL.

An order to pay alimony for the support of defendant's minor child was not a sentence, and no appeal would lie until a sentence of fine or imprisonment, or both, had been imposed.

Certiorari to Juvenile Court, Parish of Orleans; A. H. Wilson, Judge.

L. Edward Clark was found guilty of failing to provide for the support of his minor child, and was ordered to pay \$50 a month

for its support, and on his default he was ordered to furnish a guaranty bond, and in default to be held for further orders of the court. From an order of commitment until he furnished a bond, he applied for writs of certiorari and prohibition to the juvenile court for the parish of Orleans. Order for writs recalled, and application of relator refused.

Robert H. Marr, of New Orleans, for applicant. A. V. Coco, Atty. Gen., and C. C. Luzenberg, Dist. Atty., and E. Stanley, Asst. Dist. Atty., both of New Orleans (V. A. Coco, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. The record shows that relator was found guilty, March 28, 1918, of failing to provide for the support of his minor child, and that he was ordered to pay \$25 on the 1st and 15th of each month for one year, beginning April 1, 1918, for the support of said child; that he failed to pay the amount ordered by the court on April 1st; that a rule for a new trial was filed April 3d; and a rule was filed, April 4th, for defendant to show cause why the judgment of the court should not be executed. The rules for a new trial and to show cause were tried on April 11th, a new trial was refused, and the rule to show cause was—

"made absolute, and I [the judge] order defendant to furnish a guaranty bond, with security, in the sum of \$600, to guarantee future alimony; in default of furnishing guaranty bond, defendant to be held for further proceedings and orders of this court."

The record continues, on the same day: "Defendant and his counsel retired from the courtroom and returned in a few minutes."

Then:

"By Mr. Marr: After talking with Mr. Clark, I am informed that he cannot furnish a guaranty bond, and now give notice of my intention to apply to the Supreme Court of the state of Louisiana for writs," etc.

Relator represents in his petition to this court that:

"Upon refusal of a new trial, a bill of exceptions thereto being reserved, Hon. Andrew H. Wilson, judge of said court, thereupon ordered your relator into custody and to stand committed until your relator should furnish a bond in the sum of \$600, conditioned upon the payment of \$50 per month as alimony to said child for the space of one year. Now your relator shows that he is altogether unable to furnish bond for the payment of said alimony, and has so informed Hon. A. H. Wilson, judge as aforesaid, and relator shows that said judge persisted in his said order and stated that your relator would stand committed to the parish prison until said bond should have been furnished. Now your relator shows that said order is a sentence to perpetual imprisonment, and is a cruel and unusual punishment imposed upon relator for failure to furnish a bond, which said order is contrary to the Constitution of Louisiana, and to the Constitution of the United States, and it is beyond the power and authority of any court to impose, and, in particular, beyond the power and authority of said judge to commit to prison until a bond for the payment of money should have been furnished."

The ruling complained of was not made in connection with the motion for and refusal of the new trial, but in connection with the rule to show cause why the judgment should not be executed, which two rules were tried at the same time.

[1, 2] In ordering that a guaranty or conditional bond should be furnished by defendant the court did not exceed its authority, and in ordering that "in default of furnishing guaranty bond defendant be held for further proceedings and orders of this court" the court did not impose a cruel or unusual punishment upon relator, or condemn him to perpetual punishment. It is usual, in the trial of criminal cases, for the judge to remand the defendant until the bond fixed by the court is furnished.

The amount of the bond was fixed, and thereupon "defendant and his counsel retired from the courtroom and returned in a few minutes," and counsel "informed" the court that defendant could not furnish a guaranty bond. He had not apparently tried to furnish the bond; and he did not apply to the court to relieve him from furnishing the bond for any reason whatever.

Relator should have exhausted his remedies for relief in the trial court before he came to this court for relief from the orders of that court.

If relator had made request of the trial court for relief, that request would doubtless have been considered. The judge says in his return:

"Respondent makes this statement to your honors candidly and unreservedly of his intention to give defendant a full and early and prompt hearing on any matters that he desires to present for consideration, if it be Clark's ability or nonability to furnish a bond, which he ought to present to the court, or his request for sentence because of his nonability to furnish a guaranty bond. In either event he is entitled to a hearing, and should ask for it in either connection before he seeks the power and authority of your honors.

"In connection with defendant's conduct, respondent states that Clark made no effort to obtain a guaranty or conditional bond, as it is termed. His retirement from the court and return were almost immediate; and, although he had already furnished three appearance bonds with apparent ease, his counsel immediately stated Clark's inability to comply with this order. This conduct of Clark has little bearing on the question of his legal rights, which he may assert in the juvenile court, and of which he has not been and will not be deprived, but it does serve to illustrate his attitude towards the court and his little child."

The judge further answers:

"The proceedings taken in this matter have followed the practice of the criminal district court under Judges Baker and Chretien, and of the juvenile court, in the interpretation and application of Act No. 34 of 1902, and as interpreted in many of the country district courts, in requiring of the defendant a conditional or guaranty bond, that is, that defendant shall give a bond for his appearance and also to guarantee the payment of amount set out in order of court for support of child. That practice has been twice upheld by your honors in State v. J. D. Grant, No. 20875, and in State v. Edrington, No. 22993, both applying for writs under present circumstances, and in both of which applications were denied.

"It seems but fair to give defendant the opportunity to furnish a bond, if he wants to or can. He was not ordered committed or held indefinitely, but temporarily under orders of court, which required that under the rules he would, in a few days at most, be brought up for hearing, and such action as the court might determine. If he desired a hearing otherwise, he could apply for and have it. Your honors know that every man held under bond author-

ized by law, may be held for a reasonable time until he furnishes it, and that the delay is for his benefit, that he may furnish the bond to avoid sentence, which may be to prison. He would be held for a short delay, to allow him his legal privilege of giving bond, and he could not very well be subject to final judgment under this Act No. 34 of 1902 until he had failed or refused to give the bond.

"It is not true that he was to be permanently deprived of his liberty. This bond, commonly called 'conditional or guaranty bond,' is authorized by this act, and it is in the interest of the defendant as well as the child. Quoting from Act No. 34 of 1902: 'A recognizance, with or without sureties, in such sums as the court shall direct. The condition of the recognizance shall be such that if the defendant shall make his personal appearance in court whenever ordered to do so within the year, and shall further comply with the terms of the order [for the support of the child] or of any subsequent modification thereof, then the recognizance shall be void, otherwise of full force and effect.'

"If he fails to give bond he may be sentenced as pointed out by law, or the court may consider any suggestion that defendant may have to offer, as these matters are 'in conciliation,' and in the interest of the child on the part of the state."

With the assurance of the judge that he will give relator a full, early, and prompt hearing on the matter involved, the writ will be recalled.

Relator has just filed a printed brief on which he explains what was meant by his counsel in stating in open court:

"After talking with Mr. Clark, I am informed that he cannot furnish a guaranty bond."

It appears that his inability to furnish the bond was because of his refusal to do so, as he had decided and declared his intention to be not to pay the alimony to his child, as ordered by the judge. He now says:

"How could Clark get anybody to sign his bond for the payment of alimony when he definitely stated that he had no intention of paying that alimony? But that has nothing to do with the case. Clark at no time had any intention of paying the alimony; his intention as announced to the court all along, was not to

pay the alimony, but to take an appeal, and if he had furnished the bond, he would have been cut off from all right of appeal."

[3-5] These declarations not to pay alimony or to furnish a guaranty or conditional bond have much to do with the case. If relator had informed the court that he declined the favor extended of paying alimony, and asked for sentence under act No. 34, 1902, p. 42, so that he might appeal from the conviction and sentence, the judge would doubtless have completed the judgment by sentencing him, and have granted him an appeal on motion to that effect. The order to pay alimony was not a sentence; and no appeal would lie until sentence of fine or imprisonment, or both, had been imposed. *State v. Mioton*, 112 La. 180, 36 South. 314; *State ex rel. Mioton v. Judge*, 112 La. 801, 36 South. 703; *State v. Gersdorf*, 124 La. 547, 50 South. 528; *State v. Boettner*, 127 La. 253, 53 South. 555.

The order of the court to defendant to give a guaranty bond, with security to guarantee the payment of future alimony, and, in default of furnishing such bond, defendant to be held for further proceedings and orders of the court, was not, under the circumstances, unusual or harsh. Defendant, under such order, could have declined the order of the court, and have refused to pay alimony or furnish bond. But the declaration of his inability to furnish the bond did not convey to the mind of the judge that he refused to do so.

Relator should have exhausted his remedies for relief before applying to this court for writs of certiorari and prohibition.

It is ordered, adjudged, and decreed that the order for writs of certiorari and prohibition issued herein be recalled, and the application of relator be refused at his costs.

(78 South. 745)

No. 23010.

## CITY OF NEW ORLEANS v. WHITE.

(April 29, 1918. Rehearing Denied May 27, 1918.)

*(Syllabus by the Court.)*1. MUNICIPAL CORPORATIONS  $\S$ 111(4)—PARTIAL INVALIDITY — KEEPING DISORDERLY HOUSE.

The first section of a municipal ordinance declaring it unlawful to operate a house of prostitution or assignation being plain and legal, the defendant condemned under that section cannot sustain an objection of illegality to the whole ordinance on the ground that the other sections are illegal.

*(Additional Syllabus by Editorial Staff.)*2. MUNICIPAL CORPORATIONS  $\S$ 594(1)—ORDINANCE—MISDEMEANORS.

The law does not require that municipalities should grade misdemeanors or minor offenses by ordinances defining and penalizing them.

3. CONSTITUTIONAL LAW  $\S$ 165 — OBLIGATION OF CONTRACT.

An ordinance making it an offense to operate a house of prostitution and prescribing the penalty therefor and under which the mayor may order the occupants to remove does not in any manner impair the obligation of a contract.

4. CONSTITUTIONAL LAW  $\S$ 104 — VESTED RIGHTS.

Such ordinance does not divest one prosecuted thereunder of any vested rights in the real property which she owns and occupies.

5. CONSTITUTIONAL LAW  $\S$ 250—DISORDERLY CONDUCT  $\S$ 2—EQUAL PROTECTION OF THE LAWS.

Such ordinance was not harsh, unreasonable, and discriminating, so as to deny the accused to equal protection of the laws in violation of the state and federal Constitution.

6. CONSTITUTIONAL LAW  $\S$ 257—DISORDERLY CONDUCT  $\S$ 2—"DUE PROCESS OF LAW."

The proceeding by affidavit against the person charged with having committed an offense is "due process of law."

Appeal from Recorder's Court of New Orleans; Louis Burthe, Jr., Recorder.

Lulu White was convicted on affidavits charging the keeping of a house of prostitution, and she appeals. Affirmed.

Louis H. Burns and J. F. Anderson, both of New Orleans, for appellant. John J. Rell-

ey, Asst. City Atty., and I. D. Moore, City Atty., both of New Orleans, for appellee.

SOMMERVILLE, J. Lulu White was charged in two separate affidavits, filed in the Second recorder's court of the city of New Orleans, with violating section 1 of ordinance numbered 4656, C. C. S., relative to operating a house of prostitution or assignation at the premises 235 North Basin street, in the city of New Orleans, on December 29, 1917, and January 9, 1918. The two cases were consolidated and tried at one time. She was convicted in both cases and sentenced, and she has appealed.

It appears from the record that defendant was also charged under seven other separate affidavits with having violated section 3 of the same ordinance, for failing to remove from the premises indicated, and of which she was the owner, after having been served by the mayor of the city with notices to remove.

Defendant demurred to the nine affidavits just referred to, in which she assailed the validity and constitutionality of the ordinance, particularly sections 3, 4, 6, and 7, on the following grounds:

"(a) That the said ordinance does not grade the misdemeanor or minor offense sought to be defined by its terms, nor fix a maximum penalty therefor, in violation of the provisions of the Constitution of Louisiana.

"(b) That the said ordinance impairs the obligations of contract, and will divest the vested rights of defendant to her property for other than public utility, and amounts to a taking of her property without adequate compensation being first paid, in violation of the provisions of the Constitution of Louisiana and article 14 of the Constitution of the United States.

"(c) That the said ordinance is unreasonable, harsh, and discriminating, and under pretext of a due exercise of the police power denies to her the equal protection of the laws, in violation of the Constitution of Louisiana and that of the United States of America.

"(d) That said ordinance and its methods of execution, as appears from the multifarious criminal charges pending here in court, deprive petitioner of her liberty without due process of law, and abridges her privileges and immunities without limitation upon the penal-

ties therefor, in violation of said Constitution of Louisiana and of the United States.

"(e) That said ordinance is ultra vires of the power of the city of New Orleans, and would deprive defendant of her real property without lawful condemnation proceedings.

"(f) That the same, and more particularly sections 3, 4, 6, and 7 thereof, are null and void under article 7 of the Constitution of the United States, in that the defendant is denied the right of trial by jury where the value in controversy, i. e., the right to own, use, and dispose of her own property, consisting of real estate, exceeds the sum of \$20, the value thereof being more than \$25,000."

The demurrer appears to have been aimed at section 3 of the ordinance, which provides that the mayor may order the occupants of a house of prostitution to remove therefrom. But on the day following the filing of the demurrer the city attorney dismissed the seven affidavits relative to the failure of the defendant to remove from the premises indicated; and they are not involved in these cases now under consideration.

When the cases were called for trial under affidavits numbered 58124 and 58255, made under section 1 of the ordinance, prohibiting the keeping of a house of prostitution or assignation in the city of New Orleans, the prosecuting officer moved to amend said two affidavits so as to strike therefrom the words "Immoral house," and to insert in their stead, "a house of assignation or prostitution," the words used in the ordinance, so that the affidavits read, with the exception of the respective dates of the offenses charged, as follows:

"That on Saturday the 29th day of December, 1917, at about 1:15 a. m., on premises 235 North Basin street, within the jurisdiction of this court, one Lulu White did then and there willfully violate Ordinance 4656, C. C. S., relative to keeping a house of assignation and prostitution, all in violation of section 1 of said ordinance."

The amendments of the affidavits were made in open court, in due form, in the presence of the defendant, and without protest or objection on her part. The case was called for trial, and the demurrer, copied above,

was taken up and disposed of adversely to defendant.

[2] (a) The first ground of the demurrer, that the ordinance does not grade the misdemeanor, is without merit. The law does not require that municipalities should grade misdemeanors or minor offenses.

[3, 4] (b) The next objection to the ordinance is that it impairs the obligation of a contract and will divest defendant of vested rights in her property for other than for purposes of public utility, and amounts to taking her property without an adequate compensation being first paid.

The affidavits against defendant charge her with having violated a municipal ordinance relative to keeping a house of assignation or prostitution, and that does not in any manner impair the obligation of a contract, or divest her of any vested rights in the real estate which she owns and occupies.

[5] (c) The charge is made that the ordinance is unreasonable, harsh, and discriminating, and that she is thereby denied the equal protection of the laws in violation of the Constitution of the state and the United States. No argument was presented in support of this proposition, and it is without merit.

[6] (d) The next objection is aimed at the ordinance and its method of execution, "as appears from the multifarious criminal charges pending here in court," and that it deprives petitioner of her liberty without due process of law, and abridges her privileges and immunities without limitation upon the penalties therefor.

At the time of the trial, so far as the record discloses, there were but two affidavits pending against this defendant, and charging her in several affidavits, even if they existed, would not deprive her of her liberty without due process of law.

The proceeding by affidavit against a person charged with having committed an of-

fense is due process of law. The point is without merit.

The demurrer was properly overruled.

[1] It was argued in this court that sections 3, 4, 6, and 7 of the ordinance were unconstitutional, illegal, null, and void, and that the nullity of these sections carried with it the nullity of the entire ordinance.

The affidavits under consideration were made against the defendant under section 1 of the ordinance, and not under section 3, 4, or 7. Seven other affidavits were made against her under section 3 of the ordinance, but these affidavits had been dismissed, on motion of the city attorney, several days before the two cases which were tried were called for trial. The defendant is therefore without interest in attacking the constitutionality or validity of sections 3, 4, or 7.

The defendant does not attack the constitutionality or validity of section 1, which provides:

"That it is hereby declared to be unlawful for any person to keep or conduct or maintain or operate a house of prostitution or assignation, used or intended to be used for the purposes of prostitution or assignation, in any part of the city of New Orleans."

But in argument she attacks the constitutionality and legality of section 6 of the ordinance wherein the penalty is provided for violating "any of the provisions of this ordinance."

The argument was made that the section containing the penal clause is illegal, null, and void, because it is not clear; that it is confusing; that it cannot be enforced with reference to the other sections of the ordinance. There is no break between section 1, stated above, and section 6, which is here produced:

"That any person who shall violate any of the provisions of this ordinance shall be punished by the recorder having jurisdiction, for the first offense by a fine of not less than \$25.00 and in default of payment by imprisonment not exceeding thirty days, and for the second and each subsequent offense by a fine of \$25.00 and

imprisonment for thirty days, each day's violation constituting a separate and distinct offense."

Admitting, for the moment, that other sections of the ordinance are illegal, the two sections, 1 and 6, completely define a misdemeanor and provide a penalty for the commission thereof. In the case of *State v. Riley*, 49 La. Ann. 1617, 22 South. 843, it is said in the syllabus:

"The first section of a municipal ordinance declaring it unlawful for any person to keep a lottery office being plain and legal, the defendant condemned under this section is without right to sustain an objection of illegality of the whole ordinance on the ground that the second section is unconstitutional."

In Cooley's work on Constitutional Limitations (6th Ed.) pp. 211, 213, a reference on page 213 is made to a section of the Criminal Code of Illinois, which provides:

"If any person shall hereafter harbor or secrete any negro, mulatto, or person of color, the same being a slave or servant, owing service or labor to any other persons, whether they reside in this state or in any other state, or territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every person so offending shall be deemed guilty of a misdemeanor, etc., it was held, although the latter portion of the section was void within the decision of *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060, yet that the first portion, being a police regulation for the preservation of order in the state, and important to its well-being, and capable of being enforced without reference to the rest, was not affected by the invalidity of the rest."

The learned author proceeds to say:

"The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separate, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."



So that if the sections of the ordinance that were objected to were stricken out, sections 1 and 6 would be complete in themselves, and capable of being executed, wholly independent of those sections which were rejected.

Sections 1 and 6 of the ordinance are valid. Section 6 contains the only penal clause in the ordinance, and it refers to every section contained in said ordinance, by providing that a violation of any one section shall be punished in the manner stated in section 6. There is no conflict in the penalties imposed under the ordinance, and there is no confusion.

Section 1 of the ordinance is separate and distinct from the other sections, except section 6. These two sections are separable from the other sections, and they are complete in themselves; the one defining the offense, and the other providing the penalty.

The convictions of defendant must stand.  
The judgment appealed from is affirmed.

(78 South. 747)  
No. 22480.

# TOWN OF WINNFELD v. COLLINS.

(May 27, 1918.)

(Syllabus by Editorial Staff.)

On Motion to Dismiss Appeal.

## 1. COURTS — 224(7) — SUPREME COURT — APPELLATE JURISDICTION — "TAX, TOLL OR IMPOST."

A suit in which the constitutionality or legality of a local assessment or forced contribution is contested, though the amount sued for is less than \$2,000, is within the Supreme Court's jurisdiction, given by Const. art. 85, of all cases in which the constitutionality or legality of any "tax, toll or impost" is in contestation, regardless of the amount involved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax.]

On the Merits.

## 2. MUNICIPAL CORPORATIONS — 449(2) — STREET PAYMENT — ORDINANCE LEVYING ASSESSMENT — AMOUNT — RIGHT TO COMPLAIN.

Where the clerk on the adoption of an ordinance accepting paving work and levying an as-

essment neglected to record the ye and nay vote in the minutes of the meeting, the omission and the subsequent correction of the record of adoption did not injure defendant, a person assessed, and the correction should have the same effect as the record of the ye and nay vote at the proper time would have had.

## 3. MUNICIPAL CORPORATIONS — 440(2) — PAVING IMPROVEMENTS — ORDINANCE — ASSESSMENT — "AFTER THE CONTRACT HAS BEEN AWARDED."

Under Act No. 147 of 1902, § 2, providing that after the contract has been awarded the council shall provide by ordinance for an assessment of all the realty abutting a sidewalk, curbing, or portion thereof to be paved or improved, the assessment is not illegal because the ordinance levying it was not enacted before the council ordered the paving and curbing to be done; the term "after the contract has been awarded" meaning after ordering the work to be done, and the expression, "abutting the sidewalk, curbing or portion thereof to be paved or improved," being only descriptive or indicative of the property on which the assessment is to be levied.

## 4. MUNICIPAL CORPORATIONS — 339(2) — PAVING IMPROVEMENT — ASSESSMENT — VALIDITY — "ONE YEAR FROM THE TIME THAT THE CONTRACT IS AWARDED."

An assessment for a paving and curbing improvement is not invalid because the ordinance calling for bids declared that the contract would be let for work to be completed within one year from the time the contract was awarded, where the contract date allowed the contractor one year from the date thereof in which to complete the work; the term "one year from the time that the contract is awarded" properly meaning, not one year from the time of accepting a bid, but one year from the date of the contract to be signed.

## 5. APPEAL AND ERROR — 173(15) — REVIEW — OBJECTION BELOW.

A contention by defendant in a town's suit for the benefit of a paving contractor that the work was not completed within one year from the date of the contract cannot be considered, where it was not urged in defense to the suit.

## 6. MUNICIPAL CORPORATIONS — 568(3) — COMPLETION OF IMPROVEMENT — TIME — EVIDENCE.

Such contention held not supported by the evidence.

Monroe, C. J., dissenting.

Appeal from Fifth Judicial District Court, Parish of Winn; Cas Moss, Judge.

Suit by the Town of Winnfield against A. P. Collins. Verdict for plaintiff, judgment in rem, and defendant appeals. Motion to dis-

miss appeal overruled, and judgment affirmed.

Huey P. Long, of Winnfield, for appellant. Earl E. Kidd, of Winnfield, Stubbs, Theus, Grisham & Thompson, of Monroe, and R. W. Oglesby, of Winnfield, and Howe, Fenner, Spencer & Cocke, of New Orleans, for appellee.

#### On Motion to Dismiss Appeal.

O'NIELL, J. This is a suit to enforce a local assessment for sidewalk paving and curbing.

After the rehearing was granted in this case, the appellee moved for a dismissal of the appeal, for want of jurisdiction of the matter in contest.

[1] The amount sued for is less than \$2,000; that is, below the lower limit of our jurisdiction in ordinary cases. The appeal was brought to this court, however, on the theory that a local assessment or forced contribution for street paving is a tax, within the meaning of the provision in article 85 of the Constitution that the jurisdiction of the Supreme Court shall extend to all cases in which the constitutionality or legality of any tax, toll, or impost whatever shall be in contestation.

The motion to dismiss the appeal is founded upon the decisions of this court in *City of Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1, *Rooney v. Brown*, 21 La. Ann. 51, and *Board of Levee Commissioners v. Lorio Bros.*, 33 La. Ann. 276, where it was held that a forced contribution or local assessment, such as the plaintiff is attempting to enforce in this case, was not a "tax, toll or impost," within the constitutional provision giving the Supreme Court jurisdiction of all suits contesting the constitutionality or legality of any tax, toll, or impost whatever.

The decisions relied upon by the learned counsel for appellee were approved a num-

ber of times, particularly in the following cases, viz.: *Morgan's L. & T. R. & S. Co. v. Board of Health*, 36 La. Ann. 669; *Police Jury v. Mitchell*, 37 La. Ann. 45; *Charnock v. Levee District*, 38 La. Ann. 325; *Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 460, 1 South. 873; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251, 5 South. 848; *Munson v. Board of Commissioners*, 43 La. Ann. 22, 8 South. 906; and *Minor v. Dasplit*, 43 La. Ann. 338, 9 South. 49. But, in *State ex rel. Hill v. Judges of the Court of Appeals*, 46 La. Ann. 1292, 16 South. 219, all of the foregoing decisions on the subject were, in effect, overruled. It was said by the then Chief Justice, delivering the opinion for the court, that the previous decisions to the contrary had to yield to the conclusion then reached; and, in a concurring opinion, it was said of the doctrine announced in *Board of Levee Commissioners v. Lorio Bros.*, 33 La. Ann. 276, that it could not be followed.

The doctrine of *State ex rel. Hill v. Judges*, etc., has been adhered to consistently since that decision was rendered, as appears from the list of decisions quoted in the latest ruling on the question, in *Town of Minden v. Stewart et al.*, 142 La. 468, 77 South. 118. The writer of this opinion dissented from the ruling in the case last mentioned, because of his opinion that it was not the constitutionality or legality of the tax itself, but the legality of the method of assessment, that was in contest. But there has been no departure from the doctrine, since the decision in *State ex rel. Hill v. Judges*, etc., that a suit in which the constitutionality or legality of a local assessment or forced contribution is contested, as in this case, is within our jurisdiction of cases in which the constitutionality or legality of any tax, toll, or impost whatever is in contestation, regardless of the amount involved. The motion to dismiss the appeal is therefore overruled.

### On the Merits.

[2] There was error in holding, in the original opinion herein, that the ordinance authorizing the mayor to make the contract for the pavement and curbing was subject to the invalidity or infirmity that the ye and nay vote on the ordinance was not entered on the minutes of the meeting at which the ordinance was adopted. There was no such defect in that ordinance, or in the record of its adoption. It was the ordinance accepting the work and levying the assessment, on the adoption of which the clerk neglected to record the ye and nay vote in the minutes of the meeting at which it was adopted. The error, or omission, and subsequent correction, of the record of adoption of that ordinance did not injure the defendant or operate to his prejudice in any way; and we see no reason for holding that he should profit by the neglect of the clerk or secretary of the municipal council to perform his official duty, to record the ye and nay vote, at the proper time. The principle seems well established that, if the party complaining of such an omission on the part of the secretary or clerk of a municipal council is not worse off as a result of the error or omission and subsequent correction of the minutes, the correction should have the same effect as the recording of the ye and nay vote at the proper time would have had. See *Dillon on Municipal Corporations* (4th Ed.) vol. 1, par. 291; *McQuillin on Municipal Corporations*, vol. 11, pars. 525 to 628; *City of Logansport v. Crockett*, 64 Ind. 319; *Boston Turn. Co. v. Pomfret*, 20 Conn. 590; *City of Pineville v. Burchfield* (Ky.) 42 S. W. 340; *White v. Town of Clarksville*, 75 Ark. 340, 87 S. W. 630; *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821; *Webb v. Strobach*, 143 Mo. App. 459, 127 S. W. 680.

The decision in *Town of De Ridder v. Head*, 139 La. 840, 72 South. 374, relied upon by the defendant as authority for the propo-

sition that a correction of the minutes of a municipal council meeting cannot have a retroactive effect, is not authority on the question one way nor the other. In that case there was no correction of the minutes, and therefore no question as to the date from which the correction would have taken effect if a correction had been made. The minutes did not show that the ordinance in question had been adopted by a ye and nay vote; hence there was no evidence that it had been so adopted, as required by section 33 of Act No. 136 of 1898.

[3] The defendant contends that the assessment is illegal because the ordinance levying it was not enacted before the municipal council ordered the paving and curbing to be done. The argument is founded upon an expression of opinion in the case of *Town of Rayne v. Harrel*, 119 La. 656, 44 South. 333, that the assessment is a condition precedent to the right to order the improvement. In that case, however, there was no question before the court as to whether the ordinance levying the assessment should precede or follow the ordinance ordering the paving and curbing to be done. It was admitted that the town council had not, at any time, adopted an ordinance levying an assessment of the cost of the paving and curbing. The only question before the court was whether the ordinance accepting the contractor's bid for the work was equivalent to a levying of an assessment to pay for the work. The court held it was not.

To hold that the assessment must precede the ordering of the work to be done would be contrary to the statute authorizing the assessment. Section 2 of Act No. 147 of 1902, p. 262, being the authority on which the municipality acted in this instance, declares that:

"After the contract has been awarded, the council shall provide by ordinance for an assessment of all the real estate abutting the sidewalk, curbing or portion thereof to be paved

or improved, provided that, in case no satisfactory bid is received, then, and in that event, the municipal authorities of said cities or towns shall have the power to pave, gravel, macadamize or otherwise improve the said sidewalks, curbing or portions thereof, under the direction and supervision of the proper officers, and the cost thereof shall be assessed against the owners of property abutting on the said sidewalks or portions thereof."

"After the contract has been awarded" means after—and cannot mean before—ordering the work to be done. It may be inferred from the expression that the assessment is to be levied on the property "abutting the sidewalk \* \* \* to be paved" that the assessment might be levied before the work has been done. But it is not to be inferred that the assessment must be levied before the work is done. The expression, "abutting the sidewalk, curbing or portion thereof to be paved or improved," is only descriptive or indicative of the property on which the assessment is to be levied. There is no reason for holding that the assessment cannot be levied after the work contracted for has been completed, especially as the cost of the work, if done by the municipality, not under contract but under the direction and supervision of a municipal officer, would have to be assessed after the work has been done. It is true the cost of such work, under contract, might be known in advance, and therefore might—though there is no reason why it should—be assessed before the work has been done. Our conclusion is that the fact that the ordinance levying the assessment was enacted after the work was done is no reason why we should declare the ordinance invalid.

[4] The defendant contends that the assessment is invalid for the reason that the ordinance calling for bids declared that the contract would be let on the 21st of June, 1913, for the work to be completed within one year from the time the contract would be awarded; whereas the contract itself, dated January 12, 1914, allowed the con-

tractor one year from the date thereof in which to complete the work. The municipal council evidently construed the expression in the ordinance, "one year from the time that the contract is awarded," to mean, not one year from the time of the acceptance of a bid, but one year from the date of the contract to be signed. The only allegation in that respect in the answer is an alternative allegation that if there was a valid contract, which was denied, it provided for the work to be completed within one year from the date of the contract, and that a subsequent contract, entered into by the municipality, could not be valid if different from the original contract. Our interpretation of that allegation is that the defendant considered the acceptance of a bid the making of a contract, and considered the subsequent signing of the contract the making of a new and different contract. We do not consider the contention well founded. If the acceptance of the bid is to be regarded as entering into a contract, the written instrument, signed on a subsequent date, merely represented the same contract, embodying the terms, conditions, and stipulations thereof.

[5, 6] It is contended, in the defendant's brief, that the work was not completed within one year from the date of the contract. Pretermittting the question whether a delay in completing the work would invalidate the assessment, we do not consider the contention well founded: First, because it was not urged as a defense to this suit; and, second, because the evidence does not support the contention. It is true, two of the witnesses in the case gave answers indicating that the work was not completed within the time specified; but another witness testified that the work was completed some time about June, 1914. As the time of completion of the work was not an issue in the case, the plaintiff made no attempt to fix the date of completion; and it cannot be said that

the allegations of the answer were amplified by the very doubtful evidence on that subject.

Our conclusion is that the assessment levied against the defendant's property is valid, and that the judgment enforcing it is therefore correct.

The decree heretofore rendered by this court being set aside and annulled, the judgment appealed from is now affirmed at the cost of the defendant appellant.

PROVOSTY, J., takes no part, not having heard the argument. MONROE, C. J., dissents.

(78 South. 750)

No. 22616.

OUBRE et al. v. KATZ.

(April 29, 1918. Rehearing Denied May 27, 1918.)

*(Syllabus by the Court.)*

1. SEQUESTRATION ⇐21 — WRONGFUL SEQUESTRATION—PETITION—SUFFICIENCY.

A cause of action is presented in a petition which alleges that defendant unlawfully trespassed upon the premises of plaintiffs, and took unlawful possession of the property of plaintiffs, and moved same from said premises to his own place of business.

*(Additional Syllabus by Editorial Staff.)*

2. SEQUESTRATION ⇐21 — WRONGFUL SEQUESTRATION—PLEA—ESTOPPEL.

In an action for trespass in illegally entering plaintiffs' home and taking illegal possession of their personal property, a plea of estoppel to the part of the petition asking damages for the wrongful issuance of a writ of sequestration was properly sustained, where plaintiffs had paid the claim demanded in that suit.

3. SEQUESTRATION ⇐21 — WRONGFUL SEQUESTRATION—PLEA OF ESTOPPEL.

In such action, a plea of estoppel, based on plaintiffs' payment of a demand in a sequestration suit, was wrongfully sustained as the part of the claim for damages from the trespass.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Mr. and Mrs. Joseph Villier

Oubre against Pincus Katz. Exceptions of no cause of action, etc., sustained, and plaintiffs appeal. Judgment reversed, and exceptions overruled in part, and cause remanded for trial.

Theo. Cotonlo, of New Orleans, for appellants. Benjamin Y. Wolf, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiffs sued defendant in damages for an alleged trespass by him, for an illegal entry into petitioner's home, and the taking illegal possession of their personal property.

Defendant filed exceptions of vagueness, no cause of action, and estoppel, which were sustained, and plaintiffs have appealed.

Plaintiffs allege that they bought furniture from defendant on the installment plan in the year 1914; that they had paid, at sundry times, on account of the said bill for furniture, \$149; that they failed to pay for installments which afterwards became due; and that defendant sued them for the balance due, and caused a writ of sequestration to issue from the First city court of the parish of Orleans, on January 25, 1917, for the purpose of seizing the furniture. They further allege that defendant undertook to execute the writ of sequestration himself; that he entered their premises during their absence from home by breaking in, and that he took possession of their furniture, and hauled it to his own place of business; that by such unlawful and illegal acts defendant has damaged plaintiffs in the sum of \$10,000, for which amount they ask judgment in damages against him.

[1] The allegations in the petition are not so vague as not to inform defendant of the cause of action which has been filed against him. The exception of vagueness should have been overruled.

The petition clearly sets forth a cause of action, as it is one for damages based upon

an alleged trespass by defendant on the premises of plaintiffs without any lawful cause, and for the taking illegal possession of their property.

Defendant argues, in support of his exception, that plaintiffs have confessed judgment in the sequestration suit in the First city court by paying the claim therein made, with costs. This payment is alleged in plaintiffs' petition. But this is not only a suit for the issuance of a writ of sequestration. Plaintiffs now admit, under the circumstances, that the writ of sequestration was properly issued. The suit is for damages because of the mode of executing the writ adopted by the defendant. The writ is alleged not to have been executed by the constable of the court; but, according to the petition, it was executed by the defendant, in his own way, which is alleged to have been by an illegal trespass upon plaintiffs' premises, and the illegal taking possession and carrying away of their property. It is alleged in plaintiffs' petition that the illegal action on the part of defendant which is complained of in this suit was done under an alleged illegal contract made between defendant and the constable of the First city court, and that said contract, by which the constable delegated his powers of office to the defendant, was impossible, and contrary to law.

Admitting the allegations in plaintiffs' petition, to the effect that defendant impersonated and assumed the duties and prerogatives of the constable of the First city court, and trespassed upon their premises, to be true, the exception of no cause of action should have been overruled.

[2, 3] The plea of estoppel was properly sustained to that portion of the petition which asks for damages because of the wrongful issuance of the writ of sequestration. Plaintiffs have made payment of the claim demanded in that suit, and they cannot now be heard to demand damages for the

wrongful issuance of the writ of sequestration therein. But it was wrongfully sustained as to that portion of the claim for damages resulting from the alleged illegal act of defendant in trespassing upon the premises of plaintiffs, and taking illegal possession of their property.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the exceptions herein filed be overruled, except as to the plea of estoppel to the claim of plaintiffs for the illegal issuance of the writ of sequestration issued in this suit; and that this case be remanded to the district court for trial, in pursuance with law. Costs of appeal to be paid by defendant.

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(78 South. 751)

No. 23057.

STATE v. EDRINGTON.

(April 29, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by Editorial Staff.)

COURTS ~~224~~(2)—SUPREME COURT—JURISDICTION—APPEALS FROM JUVENILE COURT—CONSTITUTION.

Const. art. 85, giving the Supreme Court jurisdiction of suits involving alimony, is a general law which must yield to article 118, providing that appeals from the juvenile court shall be allowed on matters of law only.

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Prentice E. Edrington, Jr., was found guilty of unlawfully neglecting and refusing to provide for the support of his minor child, and ordered to pay alimony for her support. On his failure to pay, rule to show cause was made absolute, and defendant applied for writs of certiorari, prohibition, and mandamus, which were refused, and defendant committed to prison, and, having furnished bond, was released, and rule to show cause for nonpayment was made abso-

lute a second time, and defendant moved for new trial and suspensive appeal, which was allowed. On motion to dismiss the appeal. Appeal dismissed.

Prentice E. Edrington, Sr., of Reserve, for appellant. A. V. Coco, Atty. Gen., and Chandler C. Luzenberg, Dist. Atty., and Eugene Stanley, Asst. Dist. Atty., both of New Orleans (Vernon A. Coco, of New Orleans, of counsel), for the State.

PROVOSTY, J. No question of law is presented by the record, but only the one of fact—whether the amount which the juvenile court has condemned defendant to pay monthly for the support of his child is beyond his ability. For claiming jurisdiction of that question by this court he invokes article 85 of the Constitution, giving jurisdiction of "suits involving alimony." But conceding, for argument, that the alimony there meant is not exclusively that which a husband may be required to pay to his wife, said article is a general law which must yield to article 118, to the effect that "appeals from the juvenile court shall be allowed on matters of law only."

Appeal dismissed.

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(78 South. 751)

No. 22998.

STATE v. DESIMONE.

(April 29, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1020—APPELLATE JURISDICTION—SUPREME COURT—PENALTY—"ACTUALLY IMPOSED."

Under Const. art. 85, giving the Supreme Court appellate jurisdiction on questions of

law in criminal cases, where an imprisonment exceeding six months is "actually imposed," the court has no jurisdiction on appeal from a sentence imposing a fine of \$250 and imprisonment for six months and upon failure to pay the fine three months' additional imprisonment, as more than six months' imprisonment was not "actually imposed."

O'Niell, J., dissenting.

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Jerry Cline, Judge.

Charlie Desimone was convicted of an offense and sentenced to pay a fine of \$250 and to imprisonment for six months, and on his failure to pay the fine to three months' additional imprisonment, and he appeals. Appeal dismissed.

David R. Rosenthal, of Lake Charles, for appellant. A. V. Coco, Atty. Gen., and J. Sheldon Toomer, Dist. Atty., of Lake Charles (G. T. Hawkins, of Lake Charles, and Vernon A. Coco, of New Orleans, of counsel), for the State.

LECHE, J. The accused appeals from a sentence imposing upon him, a fine of \$250 and imprisonment in the parish jail for six months, and in case of his failure to pay the fine three months additional in the parish jail. The case is not within our jurisdiction. Upon the suggestion of the Attorney General and for the same reasons given in the cases of State v. Hamilton, 128 La. 92, 54 South. 482, and State v. Mitchell, 137 La. 1098, 69 South. 851, the appeal is dismissed.

O'NIELL, J., dissents for the reasons given in his dissenting opinion in State v. Mitchell, 69 South. 852, and in his concurring opinion in State v. Authement, 72 South. 741.

(78 South. 751)

No. 22806.

**GHISALBERTI v. CALAMARI.**(Oct. 29, 1917. On the Merits, April 29, 1918.  
Rehearing Denied May 27, 1918.)*(Syllabus by the Court.)***1. DIVORCE ~~279~~ — SEPARATION FROM BED AND BOARD — JURISDICTION OF SUPREME COURT—SUITS INVOLVING ALIMONY.**

The Supreme Court has jurisdiction in suits involving alimony, Const. art. 85.

On the Merits.

*(Additional Syllabus by Editorial Staff.)***2. DIVORCE ~~240(1)~~—SEPARATION FROM BED AND BOARD—ALIMONY—AMOUNT.**

Decree, condemning husband suing for separation to pay alimony in the sum of \$30 per month, sustained in view of the evidence as to his earnings and property.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by Peter John Ghisalberti against Dominica Calamari, his wife, for separation from bed and board, in which defendant as plaintiff in reconvention sought a separation, and in which, pending the trial, defendant ruled plaintiff to show cause why he should not pay alimony for the support of herself and child. From an interlocutory decree condemning plaintiff to pay alimony in a certain sum, he obtained a suspensive appeal. Motion to dismiss appeal overruled, and judgment affirmed.

Woodville & Woodville, of New Orleans, for appellant. L. Fred Andry, Robert E. O'Connor, and Dart, Kernan & Dart, all of New Orleans, for appellee.

On Motion to Dismiss.

LECHE, J. Plaintiff sues his wife for separation from bed and board, on the ground of abandonment. Defendant reconvenes, and as plaintiff in reconvention also prays, on the ground of ill treatment, for a separation. Pending the trial of these counter actions, defendant ruled her husband into court, to

show cause why he should not pay alimony for the support of herself and child.

[1] After due trial and hearing, the trial judge condemned the husband to pay alimony as prayed for in the sum of \$30 per month. The husband, plaintiff in the suit, thereupon obtained a suspensive appeal from said decree, and the wife moves to dismiss his appeal on the ground that this court is without jurisdiction. She cites as authority *Imhof v. Imhof*, 45 La. Ann. 716, 13 South. 90, *Naghten v. Wife*, 48 La. Ann. 800, 19 South. 762, *Carroll v. Carroll*, 48 La. Ann. 842, 19 South. 872, and *Baker v. Jewell*, 114 La. 726, 38 South. 532.

The last-cited case has no application whatever to the question at issue and appellee has evidently failed to notice that since the rendition of the decisions, quoted in the 45th and 48th Louisiana Annuals, new Constitutions were adopted in 1898 and in 1913, article 85 of which extends the jurisdiction of this court to demands for alimony. See *Dale v. Hauer*, 109 La. 711, 33 South. 741; *Murff v. McCloskey*, 138 La. 75, 70 South. 41. The motion to dismiss has no merit, and it is overruled.

On the Merits.

[2] Plaintiff appeals from an interlocutory decree, condemning him to pay to his wife, for the support of herself and a child 3½ years old, who is the offspring of the parties, \$30 per month for alimony. The only contested question is the amount of alimony. Defendant testifies that her husband, the plaintiff, earns \$200 per month and owns \$7,000 invested in the Washington Ice Company. Defendant, on the other hand, testifies that he owns no such investment; that he sells ice; that his sales average 541 tons a year; and that his profits are \$2.75 per ton, making his gross income \$1,487.75 per annum or \$124 per month. He further says that the monthly expenses of his business are: For stable rent, \$5; for mule feed, in-



cluding medicines and doctors, \$22; wear and tear on his wagon and harness, \$8; shoeing mule, \$2.25; helper, \$4; house rent for his home, \$13.50—making a total of \$54.75 per month and leaving him a net income, as we calculate it, of \$69.25 per month, and not \$55.25 as he testifies. According to the showing thus made by the parties, we do not believe that an allowance of \$30 per month is excessive. Considering further that the trial judge may increase or decrease the amount of his award, according to such change as may take place in the actual earning capacity of the plaintiff, we see no reason to amend or reverse the finding of the district court.

The judgment appealed from is affirmed.

(78 South. 761)

No. 20864.

MALONEY et al. v. ASCHAFFENBURG et al.

(June 30, 1917. On Rehearing, April 20, 1918.  
Modification of Judgment May 27, 1918.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER  $\S$ 3(4)—SALES—CONSTRUCTION OF CONTRACT—"SALE"—"AGREEMENT FOR SALE"—PAYMENT OF EARNEST MONEY.

A written contract whereby the owner of certain described property agrees to sell it, and the other party to the contract agrees to buy it, for a stated price to be paid in cash, the act of sale to be passed within a time stipulated, the party proposing to buy depositing a sum to become a part of the purchase price, is not a complete "sale," but only an "agreement for the sale," with the payment of earnest money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

2. BROKERS  $\S$ 37—ACTION FOR POSSESSION OF EARNEST MONEY—PARTIES DEFENDANT.

In a suit against an agent of the plaintiff for possession of earnest money deposited with the agent by a third party to bind his agreement to buy the plaintiffs' property, the plaintiffs made the depositor a party defendant and prayed for a judgment against him and the agent, decreeing the deposit forfeited, but did not ask for a money judgment against the depositor. The latter filed an exception of no cause of action, on the ground that the plaintiff

had failed to allege a formal putting in default on the agreement of sale or to allege any fact that dispensed with the formality of putting in default. The other defendant filed an answer to the merits, admitting the deposit and urging a demand in reconvention for his brokerage commission; and on the trial he admitted that the depositor had violated his agreement to purchase the property and had thereby forfeited the earnest money. *Held*, that the depositor was not a necessary party to the suit; and, although the exception of no cause of action should have been maintained as to the exceptor, he could not, by his exception, have the suit against the other defendant dismissed.

3. DAMAGES  $\S$ 85—EARNEST MONEY—FORFEITURE.

The party who has paid earnest money, under an agreement to buy the other party's property, and who thereafter notifies the other party that he is not in a position to carry out his agreement to buy the property, thereby forfeits the earnest money.

4. BROKERS  $\S$ 64(1)—COMMISSION—SERVICES.

When a real estate agent has procured a contract for the sale of the property of his principal, with the payment of earnest money, satisfactory to the principal, and the latter afterwards consents to an extension of the time within which the sale is to be consummated, and then manifests an intention to pay the brokerage commission in any event, and the agreement of sale is thereafter violated, and the earnest money forfeited, the owner of the property must pay the agent's commission.

On Rehearing.

5. BROKERS  $\S$ 37—ACCEPTANCE OF DEPOSIT—PRINCIPAL'S SUIT TO RECOVER—PARTIES.

Where a broker is employed to sell property and closes an agreement for its sale, he becomes agent of both the seller and the purchaser; and where, as a result of such agreement, the purchaser deposits with him 10 per cent. of the amount of the purchase price, the seller may not sue the broker to recover such deposit, without properly impleading the purchaser and making him a party to such suit.

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Paul W. Maloney and others against Albert Aschaffenburg, Willard & Elseman, and others. Exception of no cause of action by defendant Aschaffenburg overruled, and reconventional demands by the named defendants. Judgment dismissing plaintiffs' demand and in favor of the plaintiffs against Aschaffenburg on his reconven-

tional demand, and judgment in favor of defendant Aschaffenburg against defendants Willard & Elseman, and in favor of Willard & Elseman on their reconventional demand against plaintiffs, and plaintiffs appeal. Reversed, and ordered that the suit of plaintiffs be dismissed as in case of nonsuit.

Paul W. Maloney and Ed P. Foley, both of New Orleans, for appellants. Solomon Wolff and A. D. Danziger, both of New Orleans, for appellee Albert Aschaffenburg. Lazarus, Michel & Lazarus, of New Orleans, for appellee Meyer Elseman. P. M. Milner, of New Orleans, for appellee testamentary executrix of Albert Aschaffenburg, deceased.

O'NIELL, J. This is an action for possession of a certain promissory note for \$3,700, signed by Albert Aschaffenburg and Solomon Wolff, and \$500 in cash, which note and cash were deposited by Aschaffenburg with the plaintiffs' agents, Willard & Elseman, under an agreement of Aschaffenburg to buy the plaintiffs' property.

Willard & Elseman (of whom Meyer Elseman is the successor in business) were the real estate agents or brokers with whom the plaintiffs had listed their property for sale.

On the 24th of June, 1912, Aschaffenburg signed and submitted a written proposition, addressed to Willard & Elseman, offering to buy the property of the plaintiffs, as follows, viz.:

"I hereby offer forty-two thousand dollars (\$42,000) cash for the building No. 131 Dauphine street, described as follows. \* \* \*

"I agree to pay taxes, both city and state, for the year 1912, and for the act of sale before Jos. Lautenschlaeger, notary public.

"This proposition is open for your acceptance until Friday, June 28th, at which time, if accepted, I will deposit in your hands 10 per cent. of the purchase price, and agree to pass the act within 60 days from notice of your acceptance."

The offer was accepted by the plaintiffs; and on the 28th day of June, 1912, Willard & Elseman gave Aschaffenburg written notice of the acceptance, as follows, viz.:

"Your offer to buy the property No. 131 Dauphine street at forty-two thousand dollars (\$42,000), plus taxes, city and state, for the year 1912, has been accepted.

"Kindly let us have your check for forty-two hundred dollars (\$4,200), part of the purchase price, at which time we will issue our formal receipt."

It appears that it was not then convenient for Aschaffenburg to put up the \$4,200 in cash, and he, or his attorney, Solomon Wolff, who appears to have been personally interested with Aschaffenburg in the transaction, proposed to put up \$500 in cash and a promissory note for \$3,700, signed by them, in lieu of the cash deposit. The proposition was made to the plaintiffs' agents or brokers, Willard & Elseman, and was submitted by them to their principals, and accepted. Written authority was given to the agents or brokers, signed by the plaintiffs, the Maloney heirs, dated the 8th of July, 1912, to accept the deposit of \$500 cash and the note for \$3,700 in lieu of the cash deposit of \$4,200, as follows, viz.:

"In place of forty-two hundred dollars (\$4,200) cash, which was to be deposited by the purchaser of the property No. 131 Dauphine street, we hereby authorize you to accept five hundred dollars in cash, and a note due August 8, 1912, for thirty-seven hundred dollars (\$3,700), representing the balance of the 10 per cent. to bind the sale, which note is to be signed by Albert Aschaffenburg and Solomon Wolff."

The \$500 in cash, and the promissory note for \$3,700, dated the 8th of July, 1912, signed by Albert Aschaffenburg and Solomon Wolff, made payable on the 8th of August, 1912, to the order of Willard & Elseman, agents, were deposited with them on the 10th of July, 1912; and they gave their receipt to Aschaffenburg and Wolff, of that date, viz.:

"Received from Albert Aschaffenburg and Solomon Wolff forty-two hundred dollars (\$4,200), represented as follows: (1) Five hundred dollars (\$500.00) cash; (2) Thirty-seven hundred dollars (\$3,700.00), being a promissory note dated July 8, 1912, payable on August 8, 1912, to the order of Willard & Elseman, agents, payable at their office No. 632 Gravier street, bearing upon its face the inscription as follows:

'Being a part of the deposit of \$4,200, which is 10 per cent. of the purchase price of the property No. 131 Dauphine street.' Interest at 8 per cent. per annum from maturity. The whole, or forty-two hundred dollars (\$4,200.00), being a 10 per cent. part of the purchase price, which is forty-two thousand dollars (\$42,000.00) cash, of the property known as No. 131 Dauphine street. Ground measurements are 27' front on Dauphine street by 127' in depth, more or less. Purchaser to pay taxes, both city and state, for year 1912, and to pass the deed sixty (60) days from July 10, 1912, and pay for act of sale before Jos. Lautenschlaeger, N. P."

The property No. 131 Dauphine street belonged to the succession of the plaintiffs' parents, the deceased Dr. and Mrs. J. H. Maloney. Mr. Wolff, as attorney for Aschaffenburg (and apparently also on his own behalf), required or suggested that the plaintiffs, who were all of age, obtain a judgment from the civil district court recognizing them as the sole and only heirs at law of the deceased Dr. Maloney and his wife, and sending them into possession of the property. The judgment was obtained on the 30th of August, 1912. Four days later Mr. Wolff was notified thereof in writing by Messrs. Willard & Eiseman with the request that he make prompt settlement of the note of \$3,700, which was then past due.

In his reply to Messrs. Willard & Eiseman, of date the 6th of September, 1912, Mr. Wolff intimated quite plainly that he and Aschaffenburg would not be prepared to consummate the transaction within the remaining three days allowed by the agreement, and he made it plain that he and Aschaffenburg would like to get back their deposit and call the deal off. Ignoring or evading the demand for payment of the \$3,700 note, he said:

"Since your Mr. Eiseman was in my office, together with Mr. Dreyfous, I have seen Mr. Aschaffenburg, and he takes precisely the same view of this matter as I do, namely, that we have made a certain contract with you, and that contract we are going to abide by, and I beg to repeat here what I have tried to say personally, I will complete the examination of the title just as rapidly as I can, but just when that will be it is impossible for me to say.

"I am now, and have been for several months, very much occupied with matters requiring im-

mediate attention, and the attention I have heretofore given the Maloney matter has been given only because I was anxious to wind up this matter.

"I now repeat that I will finish the examination of the title just as soon as I can, but cannot say just when that will be, but if in the meantime, under the circumstances, you feel that you would prefer to cancel the contract, we hereby consent to your doing so, returning to us the \$500.00 deposited with you, and the note for \$3,700.00 which we gave you."

Either from a reading between the lines of that letter, or from something more that Mr. Wolff had said, Messrs. Willard & Eiseman felt assured that Mr. Aschaffenburg could not or would not carry out his agreement to buy the property within the remaining three days of the time he had allowed himself. The agents therefore wrote a very formal letter to each of the Maloney heirs, of date the 7th of September, 1912, reviewing the negotiations with Mr. Aschaffenburg and his attorney, reminding the Maloney heirs that the time within which the sale was to be made would expire on Monday, the 9th of September, and saying that they, the agents, had been advised by Mr. Wolff, as attorney for Aschaffenburg, that the title had not yet been examined, and that they, Aschaffenburg and Wolff, would not be in a position to accept the property within the time stipulated. The letter informed the Maloney heirs of Mr. Wolff's statement that, if the heirs preferred to cancel the contract and return the money and note deposited to bind the sale, Mr. Aschaffenburg would consent to the cancellation. The letter informed the Maloney heirs that the brokers or agents had consulted their own attorney and were advised that the heirs might pursue any one of the three courses, viz.: (1) Acquiesce in Mr. Wolff's suggestion, cancel the contract, and return the money and note deposited; (2) insist upon, and, if necessary, sue for, a specific performance of the contract; or (3) put Aschaffenburg in default, cause a forfeiture of the \$500 cash and the \$3,700 note deposited, and bring suit on the

note. The agents said in their letter that they would not suggest which course should be pursued, but they did suggest that the Maloney heirs should call at the brokers' office on Monday, the 9th of September, and advise the brokers what to do. And the brokers said, in the letter, that, unless instructed to the contrary, they would follow the advice of their attorney and request Mr. Lautenschlaeger, the notary public, to make a tender of title to Aschaffenburg on the terms specified in his agreement. The letter ended with the assertion that the brokers' commission had been earned and would be demanded, whatever course the Maloney heirs might see fit to pursue.

The Maloney heirs did not adopt any of the three suggestions made in the letter from their agents, but agreed with Messrs. Aschaffenburg and Wolff to extend the time within which the sale was to be made 60 days longer, or until the 9th of November, 1912.

Thereafter it developed that Messrs. Aschaffenburg and Wolff were unable to put up the balance of the \$42,000 in cash, and they so informed Messrs. Willard & Eiseman. On the 14th of November, 1912, the latter wrote to the Maloney heirs that Mr. Wolff was ready to take title to the property, except that he was unable to raise the cash necessary to finance the deal; that he was able to pay only a fourth of the purchase price in cash; that the brokers had found a man who was willing to take the mortgage for the balance at 7 per cent. interest and \$350 brokerage; that Mr. Wolff had agreed to increase the rate of interest to 7 per cent. on the note due in one year, but would not pay more than 6 per cent. on the two other notes. The agents urged in their letter that the Maloney heirs should contribute or stand the loss of the additional interest and the brokerage, amounting in all to \$875, in order to put the deal through and avoid a lawsuit with Messrs. Aschaffenburg and Wolff. The

Maloney heirs consented to bear the loss of the \$875 for the additional interest and brokerage, which the purchasers of the property should have borne. But it appears that, even with that concession on the part of the Maloney heirs, Messrs. Aschaffenburg and Wolff were either unable or unwilling to carry out the agreement to buy the property. They would not actually refuse to consummate the deal, but pretended that they intended to carry it out, and allowed matters to drag along, as though time or delay was of paramount importance to them.

On the 14th of December, 1912, Willard & Eiseman made a peremptory demand upon Aschaffenburg, in a letter addressed to him, as follows:

"We have been patiently awaiting some advice from you relative to your taking title to the property known as No. 131 Dauphine street, and have indulged you for practically four months. Repeated requests have been made, conferences held with your attorney, but up to this time there has been nothing but promises. We beg to notify you herewith that we must have an absolute statement from you not later than Monday, December 16th, fixing a date on which you will accept title. Upon indication from you, the necessary certificates will be ordered."

To that letter Mr. Wolff replied, on the 16th of December, 1912, as follows:

"Mr. Aschaffenburg has handed me your letter to him of recent date for answer and attention.

"Acting as attorney for Mr. Aschaffenburg, and for myself, I beg to say that our position in the matter has been fully explained to Mr. Meyer Dreyfous, and that Mr. Danziger is now representing us as our attorney, and we can do nothing more than to refer you to him.

"Please do not consider us wanting in courtesy, but we are taking the position we do because we can say no more than has already been said to Mr. Meyer Dreyfous."

Mr. Meyer Dreyfous, referred to in the foregoing letter, was the attorney for one of the Maloney heirs. Mr. Ed. P. Foley represented another of the heirs; and he and Mr. Dreyfous, at the request of Mr. Wolff, had aided in getting the Commercial-Germania Bank to agree to carry the mortgage notes, representing part of the purchase price of the pro-

posed sale, for Aschaffenburg and Wolff. Mr. Wolff suggested to Mr. Foley that the Maloney heirs should pay the fee of the bank's attorney, Mr. Walshe, for examining the title for the bank. Mr. Foley refused to make that concession, and Mr. Wolff replied that he would take care of that. Thereafter Messrs. Foley, Dreyfous, and Elseman, either together or at different times, called at the office of Mr. Wolff to ascertain the cause of so much delay. Mr. Wolff explained that he had been very busy examining a number of titles in another transaction, and had therefore found it necessary to place the Maloney deal in the hands of Mr. Danziger, who had full authority in the premises, as attorney for him and Aschaffenburg. He said that when he would receive a report on the title from Mr. Danziger, although he thought he would have some difficulty in financing the transaction, he would try to have that arranged and consummate the deal if Danziger reported favorably on the title.

On the 16th of December, 1912, Mr. Foley made a written request of Mr. Wolff to consummate the transaction, and received the following reply, dated the 18th of December, viz.:

"I have your letter of the 16th instant, and I regret to say that after you and I had agreed upon the amount of cash that Mr. Aschaffenburg and I would pay on the property, the interest rate on the deferred payments, and I had agreed further to pay the fee of Mr. Walshe for re-examining the title for the benefit of the bank, my attorney, Mr. Alfred Danziger, reported to me certain defects which he had found, and, as our agreement was subject to his approval of the title, I am therefore not in a position to go ahead with this matter.

"As it is, I have placed the matter altogether in the hands of Mr. Danziger, and will abide by his instructions.

"I may add that I have spoken to Mr. Dreyfous, and he and Mr. Danziger conferred in my presence, and the answer to Mr. Dreyfous was about what I have said to you.

"I thank you for all your courtesy in this matter, and remain," etc.

From the statement in the foregoing letter that the title had to be re-examined by the

attorney for the bank, it seems that the title had already been examined by Mr. Wolff or Mr. Danziger, and no defect had been discovered. The supposed defect was discovered by Mr. Danziger after Mr. Wolff had, in effect, admitted or displayed his and Aschaffenburg's inability to finance the transaction. In fact, the supposed defect was discovered between the 16th and 18th of December, that is, after Mr. Wolff wrote his last letter to Willard & Elseman and before he replied to Mr. Foley's letter. Mr. Wolff would not say what the supposed defect in the title was, nor would Mr. Danziger divulge the secret, or give the Maloney heirs an opportunity to show that the supposed defect was not real, or to correct it if it was. When Mr. Lautenschlaeger addressed Mr. Wolff on the subject, he replied that the matter was in the hands of Mr. A. D. Danziger, his attorney, and that he would take the property "if we would make him take it," as Mr. Lautenschlaeger expressed it.

The property No. 131 Dauphine street was thereafter sold by the Maloney heirs to a Mr. Siera for \$38,000. The purchaser employed Felix J. Dreyfous to examine the title and pass the act of sale; and, as a mere coincidence, that Mr. Dreyfous, after examining the title, left the matter in the hands of Mr. Danziger, who consummated the transaction for Siera.

Willard & Elseman refused to turn over the note of \$3,700 and the \$500 cash to the Maloney heirs without a decree of court to protect them.

This suit for possession of the promissory note and cash deposited with the plaintiffs' agents is primarily a suit against them, Willard & Elseman. The plaintiffs prayed in their petition that Albert Aschaffenburg be also cited as a defendant, but they did not ask for any judgment against him except a judgment decreeing the deposit forfeited and ordering Willard & Elseman to deliver it to the plaintiffs. The plaintiffs also prayed

that the judgment to be rendered should provide that, if Willard & Eiseman should fail to deliver the note and cash within three days, then that the plaintiff should recover of and from them \$4,200, with legal interest from judicial demand. But the plaintiffs did not ask, even in the alternative, that a money judgment be rendered against Aschaffenburg.

Before answering the suit, Aschaffenburg filed an exception of no cause of action, which was overruled.

Aschaffenburg and the firm of Willard & Eiseman filed separate answers. They admitted the agreement for the purchase of the property on the terms stated, and the extension of the time within which the transaction was to be consummated. They admitted that Aschaffenburg had deposited \$500 in cash and the note of \$3,700, in lieu of the deposit of \$4,200 in cash which Aschaffenburg had obligated himself to make and that Willard & Eiseman, as agents of the plaintiffs, had authority from their principals to accept the deposit of \$500 in cash and the note of \$3,700 in lieu of the \$4,200 cash.

Aschaffenburg's defense was and is that he was willing and ready at all times to pay the balance of the purchase price, \$42,000, but that the plaintiffs were not able to give a good or valid title to the property. Assuming that the deposit he had made was earnest money, he demanded in reconvention that judgment be rendered in his favor, ordering the plaintiffs' agents, Willard & Eiseman, to return to him the deposit of \$500 in cash and the note of \$3,700, and condemning the plaintiffs to pay him the additional sum of \$4,200, with legal interest from the date of the judgment.

Willard & Eiseman, in their answer, also set up a reconventional demand against the plaintiffs. They alleged that, as brokers in the transaction, they had earned a commission of 2½ per cent. on \$42,000; and they prayed that judgment be rendered in their favor and against the plaintiffs accordingly,

that is, for \$1,050, with legal interest from judicial demand, with recognition, of their right to apply the deposit of \$500 to that indebtedness, and with recognition of a lien and privilege in their favor on the note of \$3,700 to secure the payment of the balance of the commission due.

Judgment was rendered against the plaintiffs, dismissing their demands. Judgment was rendered in favor of the plaintiffs and against Aschaffenburg on his reconventional demand for \$4,200. Judgment was rendered in favor of Aschaffenburg and against Willard & Eiseman, ordering them to return to Aschaffenburg the deposit of \$500 in cash and the note of \$3,700. Judgment was rendered in favor of Willard & Eiseman on their reconventional demand against the plaintiffs for the brokerage commission of \$1,050, with legal interest from the date of the judgment. The plaintiffs prosecute this appeal. After the appeal was taken the firm of Willard & Eiseman was dissolved, and its assets and liabilities were taken over and assumed by Meyer Eiseman, one of the members of the firm. He has been substituted for the firm as appellee in the case, without prejudice to the rights of any other of the parties.

### Opinion.

[1] The appellee Aschaffenburg contends that his exception of no cause of action should have prevailed in the district court, because the plaintiffs did not allege in their petition that they had formally put him in default on his contract, and did not allege any fact that dispensed with the necessity of putting in default. Putting in default is a prerequisite to a suit for damages for the violation of a contract, or for rescission of the contract. R. C. C. 1912. But, as far as Willard & Eiseman are concerned, this is neither a suit for damages nor a suit for rescission of the contract. The plaintiffs are suing their agents for possession of the prom-

issory note and cash received by the agents, as such, for account of the plaintiffs.

The learned counsel for the defendant Aschaffenburg contend that the deposit sued for was not put up as earnest money, but was paid to the agents of the plaintiffs as a part of the purchase price of the property. They rely upon the decision in the case of *Provenzano v. Glaesser*, 122 La. 378, 47 South. 688, where it was held that a sum of money deposited under an agreement similar to that of Aschaffenburg was not earnest money, but a part of the purchase price, and that such a contract was not merely an agreement to sell, but a sale. That decision cannot possibly be reconciled with either of two others on the subject that immediately preceded it, nor with one that has been rendered since. We refer to *Capo v. Bugdahl*, 117 La. 902, 42 South. 478; *Smith v. Hussey*, 119 La. 32, 43 South. 902; *Legier v. Braughn*, 123 La. 463, 49 South. 22. In *Capo v. Bugdahl* a contract whereby the owner said he thereby that day sold his property for \$2,300, 10 per cent., or \$230, of which had been paid the balance being payable when the act would be passed, was not a sale, but only an agreement to sell; and that the amount received was earnest money. In *Smith v. Hussey*, and in *Legier v. Braughn*, agreements very similar to that of Aschaffenburg were held to be merely contracts to purchase, with the giving of earnest money. The present Chief Justice and senior associate justice dissented from the opinion and decree rendered in *Provenzano v. Glaesser*. The opinion does not conform with the views expressed in the other decisions on the subject, nor with the views of the court as now constituted, and is therefore overruled.

The learned counsel for Aschaffenburg refer to certain expressions in some of the correspondence that passed between the parties hereto, indicating that the amount deposited with the agents of the plaintiffs was not earnest money, but a part of the purchase

price. For example, in Aschaffenburg's agreement the amount to be deposited was referred to as 10 per cent. of the purchase price. That merely indicated what proportion of the purchase price he agreed to deposit. In the agents' notification to Aschaffenburg that his offer was accepted, the deposit was referred to as part of the purchase price. That meant merely that the agents believed the transaction would be consummated, and that the deposit would become a part of the purchase price. In the written authority given by the plaintiffs to their agents to accept the deposit of \$500 in cash and the note for \$3,700 in lieu of the \$4,200 cash the deposit is called "the 10 per cent. to bind the sale." In the receipt given by the plaintiffs' agents to Aschaffenburg the deposit is described as "being the 10 per cent. part of the purchase price." The giving of earnest money is always intended to be a part of the purchase price if the sale be consummated; and it is, or ought to be, always intended that the sale will be consummated. Nevertheless, if earnest money has been given with an agreement to buy property, either party to the agreement is at liberty to recede from it—the one who has given the earnest, by forfeiting it, and the one who has received it by returning double the amount. R. C. C. 2463. If the deposit made by Aschaffenburg was not earnest money, to be forfeited if he failed to carry out his agreement, it was of no benefit or advantage whatever to those who accepted the proposition, and there was no reason whatever for putting up the deposit. However, the best evidence of Aschaffenburg's intention that the deposit he made was given as earnest money is the fact that in his answer to this suit he regarded it as earnest money, and demanded that double the amount be returned to him. We do not consider his pleading, in that respect, an estoppel, because it was unavailing; but we regard it as Mr. Aschaffenburg's expression of the intention

with which he made the deposit. Our conclusion is that the deposit was the giving of earnest money.

[2, 3] Aschaffenburg was not a necessary party to this suit, in which the plaintiffs are seeking only to compel their agents to give up the promissory note and \$500 in cash deposited with the agents for the account of their principals. Perhaps the plaintiffs' agents, Willard & Elseman, would have had the right, to implead the depositor, Aschaffenburg, for their own protection, if the plaintiffs had not made him a defendant. But the impleading of Aschaffenburg was merely a matter of protection to the other defendants, Willard & Elseman, and a matter of grace to Aschaffenburg, on the part of the plaintiffs.

Willard & Elseman, against whom the suit had to be brought, did not plead the exception of no cause of action, nor did they object to the introduction of evidence to prove the allegation that Aschaffenburg had failed to carry out his agreement and had thereby forfeited the \$500 cash and the \$3,700 note deposited by him with Willard & Elseman, as agents of the plaintiff. In fact, Elseman testified that Aschaffenburg violated his agreement to purchase the property.

Under these circumstances, Aschaffenburg, who was not a necessary party to the suit, could not have it dismissed by his exception of no cause of action, as far as Willard & Elseman are concerned.

We cannot see what advantage Aschaffenburg had to gain by having the suit dismissed as to him, on the ground that the plaintiffs had failed to allege that he or his attorney refused to carry out the agreement, if in fact he or his attorney did refuse to carry out the agreement and did thereby dispense with the formality of being put in default. If the exception of no cause of action had been sustained by the district court, Aschaffenburg would have had to intervene in the case

or file a separate suit to assert his demand for double the amount of the earnest money deposited by him. Since the issue presented by Aschaffenburg's answer and reconventional demand has been decided against him, it would now be to his advantage to have the suit against him dismissed on the exception of no cause of action, because a judgment maintaining the exception of no cause of action would have no more effect against Aschaffenburg than a judgment of nonsuit on his reconventional demand. Our opinion is that Aschaffenburg was entitled to have his exception of no cause of action maintained; because the plaintiffs did not allege that they had formally put him in default, nor allege any fact that dispensed with the necessity of putting him in default. It is true they proved a fact that dispensed with the necessity of putting Aschaffenburg in default, but that proof was admitted over Aschaffenburg's objection that the fact had not been alleged. Hence the proof was effective only against the other defendants, Willard & Elseman. As they did not insist that Aschaffenburg be and remain a defendant in the case, and as they did not object to proof of the plaintiff's allegation that Aschaffenburg had failed to carry out his agreement and had thereby forfeited the note and money deposited with them as the plaintiffs' agents, the issue between them and the plaintiffs was tendered and decided.

On that issue, between the plaintiffs and Willard & Elseman, the proof is all one way. In his letter, dated the 18th of December, 1912, Mr. Wolff, who had full authority to represent Aschaffenburg gave formal notice to the plaintiffs that he receded from the agreement to buy the property, or, as he expressed it, was not in a position to go ahead with the matter. The only reason he assigned was that his attorney, Mr. Danziger, had reported to him certain defects which he had found in the title, and that the agree-



ment was subject to that attorney's approval of the title. That was not a valid cause for receding from the agreement. There were no defects in the title; and the agreement was not subject to the approval of the title by the attorney referred to in Mr. Wolff's letter. It was subject only to the condition that the plaintiffs' title should be valid. The proof is that the title was undoubtedly valid. It is unnecessary to review the evidence on that subject, because the defendants Willard & Eiseman do not deny that Aschaffenburg violated his agreement to purchase the property, and thereby forfeited the cash and note which he had deposited with Willard & Eiseman as the plaintiffs' agents.

[4] As to the commission claimed by the brokers, the evidence shows that the understanding and agreement between the plaintiffs and the brokers was such that the brokers earned their commission when they obtained the contract with Aschaffenburg, even though the contract allowed Aschaffenburg to recede from it by forfeiting the earnest money. The plaintiffs were satisfied with the contract which assured them either that they would sell their property for \$42,000 or collect \$4,200 as a mere forfeit; and they manifested an intention to pay the commission, in any event, when they extended the time within which Aschaffenburg was to consummate the transaction. In that respect the case is quite different from that of *Jordy v. Salmen Brick & Lumber Co.*, 121 La. 457, 46 South. 572.

The judgment appealed from is annulled; and it is now ordered, adjudged, and decreed that the defendants Willard & Eiseman, or their successor, Meyer Eiseman, deliver to the plaintiffs the promissory note signed by Albert Aschaffenburg and Solomon Wolff, for \$3,700, and the \$500 in cash deposited by Aschaffenburg on the 10th of July, 1912; and, in default of delivery of said note and cash to the plaintiffs within three days from

the date on which this judgment shall become final, that the plaintiffs recover of and from the firm of Willard & Eiseman and Meyer Eiseman in solido \$4,200, with legal interest from the 2d day of June, 1913. It is further ordered, adjudged and decreed that the firm of Willard & Eiseman, or their successor, Meyer Eiseman, recover of and from the plaintiffs the sum of \$1,050, with the right to retain the deposit of \$500 as a credit on said indebtedness and with legal interest on the balance, \$550, from the 2d of June, 1913. The ruling of the district court on the exception of no cause of action filed by Albert Aschaffenburg is reversed, and the exception is maintained as to him, reserving any right of action he may have against the plaintiffs. The plaintiffs are to pay one half and the defendants Willard & Eiseman the other half of the costs of this suit.

LECHE, J., takes no part.

#### On Rehearing.

LECHE, J. The pleadings and facts in this case are fully stated in our original opinion, and in this rehearing we are called upon to review the correctness of the legal conclusions heretofore reached by us. We held originally that plaintiffs' petition did not set forth a cause of action against Aschaffenburg for having failed either to allege that they had put Aschaffenburg in default, or to allege facts which would have dispensed them with the necessity of such putting in default. That conclusion, we are still of the opinion, was manifestly correct. But we further decided that Aschaffenburg was not a necessary party to this suit, and proceeded to render judgment upon that theory. That was the announcement of another legal conclusion in which we now believe that we committed error.

Plaintiffs in their petition, under paragraph 7, expressly allege that Willard & Eiseman

refuse to turn over to them the deposit of \$4,200, notwithstanding amicable demand by petitioners, and in the prayer of their petition ask for service on Aschaffenburg as well as upon Willard & Elseman.

The alleged reasons for which Willard & Elseman refused to comply with plaintiffs' demand was the fear of being also held responsible by Aschaffenburg, and thus have to pay a second time, and out of their own pocket. So that it is evident that both plaintiffs and defendants Willard & Elseman considered that Aschaffenburg should have his day in court that he might urge any claim on his part to the deposit, and the object of plaintiffs' suit was then not only to recover the \$4,200, but also to obtain contradictorily with Aschaffenburg, in order that the latter might thereafter be bound by the judgment, a decree which would recognize their ownership of the fund and at the same time protect Willard & Elseman.

Whether the sum of money deposited by Aschaffenburg with Willard & Elseman be considered as part of the purchase price in an executory contract of sale, or as earnest money, plaintiffs, in order to recover and to be adjudged owners thereof, must of necessity either compel Aschaffenburg to perform the contract or have the deposit declared forfeited, and, in either event, Aschaffenburg is a necessary party to such a judgment.

[5] Again, Willard & Elseman have acted in this transaction as real estate brokers, and therefore as agents of both parties; for, according to article 3016, Civil Code, a broker is considered the mandatary of both parties. We held in the case of Woods, Slayback & Co. v. Rocchi, 32 La. Ann. 210, that a broker is the agent of the original employer and becomes agent of the other party, when the bargain is definitely settled. Willard & Elseman were therefore the agents of plaintiffs, the original employers, when they undertook to sell the property and later also became the agents of Aschaffenburg when

the latter agreed to purchase the property. It was further held by this court in Louisiana Board of Trustees, etc., v. Dupuy, 31 La. Ann. 305, that where a person is the common agent of others, and is called upon to account, there should be but one proceeding, to which all those in interest should be made parties, and their rights determined in concurso. It follows that in a suit against the agents, Willard & Elseman, for an accounting, by plaintiffs one of the principals, Aschaffenburg, the other principal, is a necessary party.

The general rule is that any one having an actual interest in a controversy presented to a court for its determination should be made a party to the suit. Where, however, a suit incidentally involves the rights of a person who is not a party, the court may proceed to decide those questions which only concern the litigants and in which that person has no interest. But this cannot be done in the present suit, because the sole issue, the ownership of the deposit of \$4,200, is one in which Aschaffenburg admittedly has an interest, and does not solely concern plaintiffs and Willard & Elseman.

All of the parties by their pleadings and arguments wish to obtain a decree which will finally settle their rights to the deposit in the hands of Willard & Elseman, and believing that Aschaffenburg was not properly impleaded, and that he is a necessary party in order to attain that end:

It is ordered that plaintiffs' suit be dismissed as of nonsuit at their costs in both courts.

O'NIELL, J., dissents for the reasons stated in the original opinions and for the further reasons now handed down. See 78 South. 767.

#### Modification of Judgment.

PER CURIAM. The plaintiffs, Paul W. Maloney and others, and the firm of Willard

& Eiseman, one of the defendants, have by written motions, in effect, consented that our decree be amended. The former pray that we expressly mention therein the fact that the judgment of the lower court condemning them to pay to Willard & Eiseman the sum of \$1,050 is reversed, and the latter, on the contrary prays that the affirmance of that judgment be expressly stated. Considering that the amendment prayed for cannot injuriously affect the rights of Aschaffenburg, the other defendant, and that it only seeks to remove an apparent ambiguity, therefore, with a view of making our said decree more explicit and clear, it is ordered that, without granting another rehearing, it be amended and restated as follows:

It is ordered that the judgment appealed from be set aside, avoided, and annulled, and that the suit of plaintiffs be dismissed as in case of nonsuit, at their costs in both courts.

O'NIELL, J., dissents.

(78 South. 843)

No. 23088.

STATE v. MINION.

(May 27, 1918.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ~~§~~150—RETAILING WITHOUT LICENSE—EVIDENCE.

One isolated sale of intoxicating liquor constitutes a violation of section 910, Rev. St., which penalizes the offense of retailing intoxicating liquors without previously obtaining a license.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Sam Minion was convicted of the statutory offense of retailing intoxicating liquors without a license, and he appeals. Affirmed.

Hugh C. Fisher, of Shreveport, for appellant. A. V. Coco, Atty. Gen., and L. C.

Blanchard, Dist. Atty., of Shreveport (Vernon A. Coco, of New Orleans, of counsel), for the State.

LECHE, J. The accused appeals from a conviction, and alleges as error a ruling of the trial court, holding that "one isolated sale of intoxicating liquor constitutes a violation" of section 910 of the Revised Statutes. The statute says that whoever shall retail intoxicating liquors without previously obtaining a license, etc. That question was decided adversely to the contention of defendant, in *State v. Green*, 127 La. 832, 54 South. 45.

The judgment of the district court is affirmed.

(78 South. 843)

No. 21846.

DREYFOUS v. PAPALIA.

(March 20, 1916, and Jan. 3, 1918. On Rehearing, May 27, 1918.)

(Syllabus by Editorial Staff.)

1. MORTGAGES ~~§~~413—EXECUTORY PROCESS—INJUNCTION—PLEADING.

In a suit for executory process, the allegation that plaintiff, before whom the act of mortgage was passed, could not at the same time act as notary and lender and give to himself a mortgage, without alleging that he did act as a notary and lender, did not set forth a cause for an injunction.

2. BILLS AND NOTES ~~§~~343 — PURCHASE — NOTARY.

Where a notary was not shown to have a personal interest in the transaction when the notarial act was passed, the fact that the negotiable notes were secured by an act of mortgage passed before him as notary public was no reason why he could not afterwards purchase the notes in good faith.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Suit for executory process by Felix J. Dreyfous against Widow Pasquale Papalia. Writ issued, and, pending the sale of the property, defendant obtained an injunction,

and on a rule issued at the instance of plaintiff in the foreclosure suit, defendant in the injunction suit, the writ was dissolved, and the widow appeals. Appeal dismissed, and judgment affirmed.

Theo. Cotonio, of New Orleans, for appellant. Felix J. Dreyfous and Alfred D. Danziger, both of New Orleans, for appellee.

#### On Motion to Dismiss Appeal.

O'NIELL, J. The plaintiff has moved to dismiss the defendant's appeal. The ground of the motion and the circumstances of the case are similar to those in the case of Frank B. Twomey v. Pasquale Papalia (No. 21815) 142 La. 621, 77 South. 479, decided on the 6th instant. For the reasons assigned in that case, the motion to dismiss this appeal is denied.

O'NIELL, J. The plaintiff is the holder and owner of certain promissory notes signed by Pasquale Papalia and secured by an authentic act of mortgage on two pieces of property and a vendor's lien on one of them. The mortgagor died, leaving a widow in community and two minor children. The mortgaged property being community property, a half interest was inherited by the minor children and the other half belonged to the widow. The mortgagee instituted this executory proceeding against the widow and a special tutor and curator ad hoc, who was appointed to represent the minor children. The widow arrested the sale by injunction, on all of the grounds stated in the case of Twomey v. Papalia, 142 La. 621, 77 South. 479, and on this further allegation, viz.:

"That, if said debt was justly due, the said Dreyfous, before whom the act of mortgage was passed, could not at the same time act as notary and lender and give to himself a mortgage;

therefore the notarial act under which said Dreyfous claims is not an authentic act, or the authentic act required by law."

On a rule issued at the instance of the plaintiff in the foreclosure suit (defendant in the injunction suit), the writ was dissolved, on the face of the pleadings. The widow Papalia, plaintiff in the injunction suit, prosecutes this appeal.

We see no reason for reviewing the questions decided in Twomey v. Papalia, and repounded again in this case. The learned counsel for appellant contends that our ruling, that the mortgagee could legally proceed against the widow and a special tutor and curator ad hoc appointed to represent the minor heirs of the deceased mortgagor, is contrary to the decision in Poultney's Heirs v. Cecil's Executor, 8 La. 321; but we have carefully read the decision cited again and find no conflict between the doctrine announced there and that maintained in Twomey v. Papalia.

[1, 2] The allegation that "the said Dreyfous, before whom the act of mortgage was passed, could not, at the same time, act as notary and lender and give to himself a mortgage," does not set forth a cause for an injunction. The appellant did not allege that Dreyfous did act as notary and lender and give to himself a mortgage, but merely that he could not act in both capacities at one time. The record does not disclose that Mr. Dreyfous had a personal interest in the transaction when the notarial act was passed; and the fact that the negotiable promissory notes were secured by an act passed before him as notary public is no reason why he could not afterwards purchase the notes in good faith.

The judgment appealed from is affirmed, at appellant's cost.

(78 South. 844)

No. 21789.

## HILL v. BATTALION WASHINGTON ARTILLERY OF CITY OF NEW ORLEANS.

(May 27, 1918.)

*(Syllabus by the Court.)*NUISANCE  $\S$ 23(1)—INJUNCTION—INTENDED USE.

Where a structure, intended for use as a stable, is not shown to be a nuisance, as actually used, or likely to become a nuisance if when used as intended, an injunction prohibiting such intended use is properly dismissed.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action for injunction by James D. Hill against the Battalion Washington Artillery of the City of New Orleans. Judgment for defendant refusing an injunction, and plaintiff appeals. Judgment amended, and, as amended, affirmed.

H. G. Morgan and L. A. Morphy, both of New Orleans, for appellant. A. V. Coco, Atty. Gen., for appellee.

MONROE, C. J. Plaintiff, as owner of certain premises fronting on St. Charles street, in the square otherwise bounded by Julia, St. Joseph, and Carondelet streets, prosecutes this appeal from a judgment rejecting his demand for a writ of injunction restraining defendant and its agents from keeping horses in, or using as a stable, certain sheds, or buildings, alleged to be in course of construction in the rear of, and adjoining, said premises; the allegation being that the proximity thereof will render the premises less habitable and depreciate their value.

It appears from the testimony, taken on the hearing below, that the structure complained of was completed before this suit was instituted; that the work was done at the expense of the state, upon a lot leased from A. D. Michel; that the horses, to

be therein installed, are to be furnished by the United States and maintained at the expense of the state, for the use of the Battalion Washington Artillery, a military organization now in the service of the United States, though whether it is the particular organization herein made defendant is not so clear. However that may be, the testimony fails to show that the structure in question, as now used, is a nuisance, or that it will become a nuisance when used as proposed. As suggested, however, we shall reserve to plaintiff the right to renew this suit in the event that it should so become, though we are inclined to think that he would have that right, without the reservation.

It is therefore ordered that the judgment appealed from be so amended as to reserve to plaintiff the right to renew this suit in the event the stable in question should hereafter be allowed to become a nuisance, and, as thus amended, affirmed; plaintiff to pay all costs.

(78 South. 845)

No. 23075.

## STATE v. HARPER.

(May 27, 1918.)

*(Syllabus by Editorial Staff.)*1. CRIMINAL LAW  $\S$ 1090(7)—REFUSAL OF MOTION FOR CONTINUANCE—DISCRETION OF TRIAL COURT—REVIEW.

The refusal of a motion for a continuance based on the absence of one of defendant's attorneys is so largely within the discretion of the trial judge that an appellate court cannot intelligently review his ruling without a full knowledge of the circumstances and of his reasons for the ruling, which knowledge can be brought up only by presenting a formal bill of exceptions, and allowing the trial judge to submit a statement per curiam. An assignment of error showing only the defendant's side of the controversy does not serve that purpose.

2. CRIMINAL LAW  $\S$ 1120(1)—EXCLUSION OF IMPEACHING TESTIMONY—REVIEW.

Without knowing what testimony was sought to be impeached or contradicted, the Supreme

Court cannot say that the trial judge erred in excluding impeaching testimony.

**3. HOMICIDE —181—PROVOCATION—ADMISSION OF EVIDENCE.**

Where there was no proof that the boy whom defendant killed had provoked the difficulty, a conversation of defendant with the father of the deceased prior to the killing, when the boy was not present, in which defendant said that he believed the boy intended to kill him, and the boy's father said that he would, and that if defendant hurt him the father would kill defendant, offered to show that defendant acted without malice aforethought in the heat of passion, was properly excluded.

**4. HOMICIDE —188(3)—EVIDENCE—DANGEROUS CHARACTER OF DECEASED.**

Where the evidence showed that defendant was the aggressor, evidence of the dangerous or desperate character of the deceased was inadmissible.

**5. CRIMINAL LAW —720½—TRIAL—ARGUMENT.**

The district attorney's declaration in argument that he never prosecuted cases that were without merit, and that he selected the strongest cases to prosecute, was objectionable as attempting to impress the jury with his own opinion as to defendant's guilt.

**6. CRIMINAL LAW —730(1)—OBJECTIONABLE ARGUMENT—HARMLESS ERROR.**

Where the trial judge told the jury to pay no attention to the irrelevant remarks of the district attorney in argument, and it was not likely that such argument influenced the jury after such instruction was given, the error would be disregarded.

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Willie Harper was convicted of murder, and sentenced to life imprisonment, and he appeals. Affirmed.

Foster, Looney & Wilkinson, of Shreveport, for appellant. A. V. Coco, Atty. Gen., and Lal C. Blanchard, Dist. Atty., of Shreveport (Vernon A. Coco, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendant appeals from a verdict convicting him of murder, without capital punishment, and from a sentence of lifetime imprisonment.

Complaint is made, in an assignment of

errors in appellant's brief, of the overruling of a motion for a continuance. The motion was based upon the allegation that the attorney who had charge of the defense was absent because of illness, and that his associates were not prepared to defend the case.

The minutes of the trial show that the defendant's counsel reserved a bill of exceptions to the overruling of the motion for a continuance; but it does not appear that a formal bill of exceptions was presented for the signature of the judge.

[1] The granting or refusing of a motion for continuance, based upon the absence of one of the attorneys representing the defendant in a criminal prosecution, is a matter so largely within the discretion of the trial judge that an appellate court cannot intelligently review his ruling without full knowledge of the circumstances and of his reasons for the ruling. That knowledge can be brought up to the appellate court only by presenting a formal bill of exceptions to the trial judge, and allowing him to submit a statement per curiam. An assignment of errors, showing only the defendant's side of the controversy, does not serve the purpose. That method of obtaining a reversal of a ruling in a criminal case cannot avail, unless the record discloses both sides of the issue presented.

[2] The first bill of exceptions in the record discloses that, during the trial the father of the boy who was slain was recalled to the witness stand for the purpose of impeaching him by inquiring whether a certain conversation had taken place between the witness and the defendant a few minutes before the killing. The substance of the alleged conversation was that the defendant said that he believed the witness' boy intended to kill him (defendant), and that the witness replied, "He sure' will kill you, and if you hurt him I will kill you myself." The

district attorney objected to the question on the ground that it was irrelevant, and the objection was sustained. It is stated in the bill of exception that the purpose was to show the condition of mind of the defendant at the time of the homicide, and to show that he acted, not with malice aforethought, but in heat of passion, if not in self-defense. From the statement that the witness was recalled, and that the purpose of the question was to impeach him, we assume that he had already testified on behalf of the state. But there is no indication of what the witness had testified to, or that his testimony was important. Without knowing what was the testimony sought to be impeached or contradicted, we cannot say that the judge erred in excluding the testimony offered for the purpose of impeachment.

[3] When the defendant was testifying in his own defense, his attorney asked him whether the conversation referred to above, with the father of the deceased, had occurred 10 or 15 minutes before the killing. The district attorney objected, on the ground that the alleged conversation was no part of the fatal difficulty, and was irrelevant. The objection was sustained, and another bill of exceptions was reserved to the ruling. It appears from the statement per curiam that the boy whom the defendant afterwards killed was not present during the alleged conversation between the defendant and the boy's father, and that the parties to the conversation had separated when the fatal difficulty occurred. Without any proof that the boy whom the defendant killed provoked the difficulty, the conversation sought to be proven could not have been such provocation for the killing as to reduce the crime from murder to manslaughter. Proof of the alleged conversation, therefore, was properly excluded.

[4] A bill of exception was taken to a ruling excluding evidence of the reputation of the deceased as a man of dangerous and desperate character. The objection to the evidence was that there was no proof that the deceased had provoked the difficulty, or made any hostile demonstration, or committed any overt act towards the accused before the killing. The testimony relied upon by the defendant to show that the deceased was the offending party in the difficulty is attached to the bill of exceptions; and, assuming that it is all of the evidence offered on the defendant's side of the question, we find no evidence that the deceased was the aggressor, or provoked the difficulty. On the contrary, the evidence submitted by the defendant on that question was completely against him, and left no issue as to who was the aggressor in the fatal difficulty. Evidence of the dangerous or desperate character of the deceased, therefore, was not admissible.

[5, 6] In his argument before the jury, the district attorney declared that he never prosecuted cases that were without merit, and said, in effect, that he selected the strongest cases to prosecute. The defendant's attorney promptly objected and took exception to the statements; and the judge then said that the jury would pay no attention to such remarks of the district attorney, as they were irrelevant. Although it was indeed wrong for the district attorney to attempt to impress the jury with his own opinion of the guilt of the defendant, from other evidence than what was heard on the trial by the jury, it is not likely that the improper remarks of the district attorney had any influence upon the jury after the judge gave the instruction that the remarks were irrelevant, and should be disregarded.

The verdict and sentence appealed from are affirmed.

(78 South. 847)

No. 23101.

STATE ex rel. TATE et al. v. BROOKS-SCANLON CO. et al.

In re BROOKS-SCANLON CO. et al.

(May 27, 1918.)

*(Syllabus by the Court.)*

## 1. JURISDICTION OF RAILROAD COMMISSION—CONSTITUTIONAL PROVISIONS.

The Railroad Commission of Louisiana has power and authority over all matters and things connected with and concerning the service to be given by railroads, express, telephone, telegraph, steamboat, and other water craft, and sleeping car companies and corporations in the state, and their operations within the state.

## 2. PUBLIC SERVICE COMMISSIONS —21—JURISDICTION OF COURTS.

The courts of the state have not original jurisdiction in such matters, but they may review the decisions of the commission.

Petition for injunction by the State of Louisiana, on the relation of C. M. Tate and others, against the Brooks-Scanlon Company and another. Exceptions to jurisdiction of district court overruled, and defendants apply for writs of mandamus, certiorari, and prohibition against the Twenty-Fifth Judicial District, parish of Tangipahoa and Hon. W. S. Rownd, Judge. Writ of prohibition issued against the judges of the district court and plaintiffs, mandatory injunction dissolved, and case dismissed.

R., C. & S. Reld, of Amite, for applicants. W. M. Barrow, Asst. Atty. Gen. (Ponder & Ponder, of Leesville, of counsel), for respondents.

SOMMERVILLE, J. The state, on the relation of certain residents and taxpayers of the parish of Washington, sued out a mandatory injunction, enjoining, prohibiting, and restraining the two defendants from abandoning, taking up, removing, or doing away with any part of the railroad track owned by the Brooks-Scanlon Company, and leased by

it to the Kentwood & Eastern Railway Company, and further prohibiting said railroad from abandoning or discontinuing the running of trains and giving service as had been given in the past between Kentwood in the parish of Tangipahoa and Hackley in Washington parish.

The two companies appeared and excepted to the jurisdiction of the district court of Tangipahoa parish, in which the Kentwood & Eastern Railway Company is domiciled, on the ground that the court was without jurisdiction *ratione materiæ*, as plaintiffs had not first applied to the Railroad Commission of Louisiana and obtained action on their application, and on the further ground that only the district court of the domicile of the Railroad Commission in Baton Rouge had the power and authority to review any order made by said commission.

The exceptions were overruled, and defendants have applied for writs of certiorari and prohibition to issue to the district court.

[1] The organization of the Railroad Commission of Louisiana was provided for in article 283 of the Constitution; and to it was given the power and authority and duty to make rates, etc., which would "affect and include all matters and things connected with and concerning the service to be given by railroad, express, telephone, telegraph, steamboat, and other water craft, and sleeping car companies, and corporations in the state, and their operations within the state." Articles 284 and 286.

The matter and thing here presented for decision affects and includes the service to be given the public by the defendant railroad companies and the operation of a railroad within the state.

[2] It is a matter exclusively within the jurisdiction of the commission, and the decision of that body thereon is subject to review at the suit of the railroad affected by the decision, in the district court at the dom-



idle of the commission, and in the Supreme Court on appeal. Const. art. 285.

It is only after the commission has acted that the court may be appealed to.

The commission does not appear to have acted with reference to defendants in the matter complained of by plaintiffs; but, until the commission's power and authority have been invoked to compel defendants to continue their operations and to serve the public as a common carrier within the state, and a decision has been rendered by the commission, the court is without authority or jurisdiction in the premises.

While the Constitution says the courts shall be open, and that any person, for injury done him in his rights, lands, goods, person, or reputation shall have adequate remedy by due process of law and justice it also provides for a railroad commission with "power to summon and compel the attendance of witnesses, to swear witnesses, and to compel the production of books and papers, to take testimony under commission, and to punish for contempt as fully as is provided by law for the district courts," on the hearing of "complaints that may be made against the classification or rates it [the commission] may establish; and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts required or authorized by these provisions." Article 284. This is due process of law and justice. It provides for the preliminary steps to be taken by complainants before the Railroad Commission before the courts may be resorted to.

It is contended that the Railroad Commission is without power to prohibit common carriers from dissolving or totally abandoning their properties; that the commission may in a case before it, determine a reasonable rule; and that rule or order must, if contested, be reviewed by the courts, and

enforced, if upheld; that it may control the railroads while they are in operation, but that it has no authority to prevent them from going out of business; that the courts must determine the question whether these defendants shall operate a railroad owned by them, before the commission can exercise the authority to regulate and control the service.

But, defendants are operating a railroad, and the commission may exercise its authority to regulate and control the service thereof. To it is given the power and authority, not only affecting and including the transportation of passengers, freight, etc., but of "all matters and things connected with and concerning the service to be given by railroads, steamboats, etc., and their operations within the state."

In the case of *Railroad Commission of Louisiana v. Kansas City Southern Ry. Co.*, 111 La. 133, 35 South. 487, we say:

"The article [of the Constitution] just referred to unquestionably confers on the commission the power of regulating the service as between it and the public. \* \* \*

"The word 'regulate' has a broad meaning. We think it includes the power to see to the maintenance of the main track and all its switches and spurs as they were at the time of taking charge, and the power to prevent any change when reasonably, in public interest, no change should be made. \* \* \*

"The power to 'regulate' carries with it full power over the thing subject to regulation. Here the Constitution has placed the railroad and its appurtenances under the authority of the commission.

"This, we understand, was the view taken by the courts in passing upon words in the Interstate Commerce Act of similar import to those in our Constitution regarding railroads and their management, placed under a commission in accordance with the requirement of the Interstate Commerce Act. The broadest meaning is given to the words 'govern' and 'regulate.' Am. & Eng. Enc. of Law, verbo 'Interstate Commerce.' It follows, the thing to be regulated includes main line and side tracks already laid. \* \* \*

"The power to regulate authorizes appropriate orders to maintain the property in the condition of use in which it should be kept; that is, in a safe and useful condition.

"The intention, we take it, in authorizing the commission to 'regulate' and 'govern'—words of

the organic law—was to invest the commission with sufficient authority to prevent the railroad from taking down and doing away with any part of its road."

It is quite clear from the language of the Constitution that the Railroad Commission has power and authority over all matters and things connected with and concerning the service to be given by railroads within the state of Louisiana, and that the courts are without jurisdiction in such matters until after the commission shall have acted and the railroad company has filed a petition in the court at the domicile of the commission, setting forth any objections it may make to such decision or order.

As it appears that the Railroad Commission has not taken any steps in the premises, the district court of Tangipahoa parish was without jurisdiction to issue a mandatory injunction in this case.

It is therefore ordered, adjudged, and decreed that a writ of prohibition issue herein, forbidding the judges of the district court for the parish of Tangipahoa and the plaintiffs from proceeding further in this case, that the mandatory injunction issued be dissolved, and that the case be dismissed, at plaintiffs' costs.

O'NIELL, J., concurs in the decree.

(78 South. 933)

No. 22979.

STATE v. ROBINSON et al.

(April 29, 1918. Rehearing Denied May 27, 1918.)

(Syllabus by Editorial Staff.)

1. HOMICIDE  $\S$  285—INDICTMENT—INSTRUCTION.

Since it is not essential that an indictment for murder contain the word "willful" or "willfully," the charge defining the offense need not contain the word.

2. HOMICIDE  $\S$  8—MURDER.

The crime of murder under Louisiana law is exactly and precisely the same as at common law.

3. INDICTMENT AND INFORMATION  $\S$  110(2)—INDICTMENT—COMMON LAW AND STATUTE.

Though the common-law form of indictment for murder is good under Louisiana law, if the short form of indictment, provided by Rev. St.  $\S$  1048, is used, it must be strictly adhered to, and the word "willfully" employed.

4. HOMICIDE  $\S$  285—MURDER—SHORT FORM OF INDICTMENT—INSTRUCTION—STATUTE.

If Rev. St.  $\S$  1048, prescribing the short form of indictment for murder, prohibits the use of the common-law form of indictment, and makes imperative the use of the short form, only the indictment is thereby regulated, and not the court's charge describing the offense, which need not contain the word "willfully," as the short form of indictment must.

5. HOMICIDE  $\S$  7—"MURDER."

"Murder," as defined at common law, is where a person of sound mind and discretion unlawfully kills any human being in the peace of the sovereign, with malice aforethought, either express or implied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder.]

6. CRIMINAL LAW  $\S$  1091(10)—APPEAL—BILL OF EXCEPTIONS.

Defendant's bill of exceptions to the charge defining murder, which did not show that the trial judge was informed when the exception was taken in what respect his definition was held to be defective, was itself defective.

7. HOMICIDE  $\S$  285—INSTRUCTION—DEFINITION OF MURDER.

The judge trying a prosecution for murder is not required by any law to include a definition of murder in his charge, whether framed by himself or by somebody else.

8. HOMICIDE  $\S$  285—INSTRUCTIONS.

In a prosecution for murder the trial judge in charging is not compelled by any statute or rule at common law to use any particular words or set of words in fulfilling his duty of giving the jury a knowledge of the law of murder.

9. CRIMINAL LAW  $\S$  9 — COMMON-LAW CRIMES.

No common-law crimes exist in Louisiana, nothing being a crime which is not so by statute.

10. HOMICIDE  $\S$  127, 285—INDICTMENT AND CHARGE—STATUTE.

Despite Rev. St.  $\S$  784, providing that whoever shall commit the crime of willful murder on conviction thereof shall suffer death, an indictment for murder, and the court's charge defining the offense, need not use the word "willful" or "willfully."

11. HOMICIDE  $\S$  31 — INVOLUNTARY MANSLAUGHTER.

No such crime as involuntary manslaughter is known to the Louisiana law, though at com-

mon law there was such a crime, punishable differently from voluntary manslaughter.

**12. HOMICIDE — 21—DEGREES OF MURDER.**

In Louisiana there are no degrees of murder, but, as at common law, only plain murder.

**13. HOMICIDE — 300(2)—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.**

In a prosecution for murder, the judge is not required to charge as to involuntary manslaughter, a crime unknown to Louisiana law, since he is required only to "give to the jury a knowledge of the law."

**14. HOMICIDE — 129—INDICTMENT FOR MURDER — "MALICIOUSLY" — "MALICE AFORETHOUGHT."**

The word "aforethought," qualifying "malice," is so technical that it cannot be left out of an indictment for murder, and "maliciously" and "malice aforethought" do not mean the same thing, malice comprehending ill will, wickedness of disposition, cruelty, recklessness, and a mind regardless of social duty, while "malice aforethought" or "premeditated design" includes in addition premeditated malice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice Aforethought; Malice.]

**15. HOMICIDE — 286(3) — MURDER—INSTRUCTIONS.**

In a prosecution for murder, the court improperly charged that the word "aforethought," used in connection with the word "malice" in the definition of murder, adds little, if any, to the meaning of the word "malice" standing alone.

**16. HOMICIDE — 309(6)—MURDER—INSTRUCTION.**

In a prosecution for murder, where deceased was not fighting with his fists, and accused did not know deceased was unarmed, the court's charge that, where only one of the parties enters the fight armed with a dangerous weapon, with felonious intent to make use of it, and does so against his unarmed antagonist, who is fighting with his fists, and kills him, the slayer is not to be heard to say the killing was manslaughter as done in sudden heat of passion was erroneous, as abstract, stating hypothetical facts not fitting the case, etc.

**17. HOMICIDE — 300(13)—MURDER—INSTRUCTIONS.**

In a prosecution for murder, where neither party struck the other, and there was evidence that deceased had thrown his hand behind him, and that, on his doing so, accused had fired the fatal shot, the instruction that to call a man a son of a bitch, and to inflict upon him a violent blow in the face with the fist, would be adequate cause of provocation to the person so insulted and assaulted to reduce his killing of the assaulting party to manslaughter was erroneous, as calculated to create the impression that accused must have been violently assaulted in order to be in a position to plead self-defense.

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**18. HOMICIDE — 110—SELF-DEFENSE—FELONIOUS ASSAULT.**

To justify a killing as in self-defense, the overt act on the part of the deceased person need not have amounted to a felonious assault; the test being, not what the person assaulting, or apparently assaulting, intended, but what the act he did, taken in consideration with the facts, caused defendant to believe was his intention.

Monroe, C. J., and Leche, J., dissenting in part.

Appeal from Tenth Judicial District Court, Parish of Concordia; N. M. Calhoun, Judge.

Indictment of Grover Robinson and John Robinson for murder. From conviction appeal is taken. Judgment and verdict set aside, and case remanded, to be proceeded with according to law.

Dale, Young & Dale, of St. Joseph, and Stone Deavours and B. W. Sharborough, both of Laurel, Miss., for appellants. A. V. Coco, Atty. Gen., and Jos. M. Reeves, Dist. Atty., of Vidalia (R. D. Calhoun and Hugh Tullis, both of Vidalia, and Vernon A. Coco, of New Orleans, of counsel), for the State.

PROVOSTY, J. The accused was convicted of murder, without capital punishment, and has appealed.

[1, 2] His first complaint is of the definition of murder contained in the judge's charge to the jury, which is the one found in the common law books. He contends that this definition is not sufficient under our law because it does not contain the word "willful" or "willfully." His learned counsel argue that, this word, being essential, or sacramental, in the description of the crime in the indictment, is logically so in the judge's charge to the jury. If this crime cannot possibly, they argue, be described adequately by the grand jury to the court in the indictment without the use of this word, how can it possibly be described adequately by the judge to the jury in his charge without the use of this same word.

The answer is that the crime can be ade-

quately described by the grand jury to the court in the indictment without the use of this word. This word was not sacramental in the indictment at common law, and the crime of murder under our law is exactly and precisely the same as at common law. As to this word not having been essential or sacramental in the indictment at common law, see *State v. Harris*, 27 La. Ann. 572, Bishop, New Crim. Pro. vol. 2, p. 234, par. 546, where the author says:

"This word willfully, alike in reason and on such authorities as we have, is not important."

See 1 Chitty, Crim. L. par. 242, where, in stating the terms which are "absolutely necessary" in an indictment for murder, the author mentions "feloniously" and "of his malice aforethought," but makes no mention of willfully. See Bouvier Law Dict., where these same words are said to be indispensable in an indictment for murder, citing long lists of authorities; and where no mention at all is made of the word "willful" or "willfully," as if having no technical, or special, legal meaning, and therefore not entitled to a place in a law dictionary. We might multiply proofs, but these ought to suffice.

As to murder being the same under our law as at common law, see *State v. Mullen*, 14 La. Ann. 570. That decision has been acquiesced in by bench and bar for now more than 60 years, and in fact we do not understand counsel as questioning its soundness even in this case. The court there said:

"The second section of the act of 1855, p. 130 [now § 785, Rev. Stat.] which declares that there shall be no crime known under the name of murder in the second degree, and authorizes the jury to find the prisoner guilty of manslaughter, does not confine the crime of murder to cases where the homicide is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, as was provided by the act of July 3, 1805, but leaves the definition of the offense as defined and known under the common law of England. The first section of the act of 1855 is almost a literal

re-enactment of the third section of the act of 23d of January, 1805. It provides, that whoever shall commit the crime of willful murder, on conviction thereof, shall suffer death. \* \* \*

"By the act of 1805, still in force, it is provided that all crimes, offenses and misdemeanors shall be taken, intended, and construed, according to and in conformity with the common law of England. To ascertain, then, what constitutes the crime of willful murder, we must have recourse to the writers of the common law. The district judge did not, therefore, err in refusing to charge the jury, that the word 'willful' was used in the statute in the sense of 'premeditated,' and that the Legislature intended to modify the crime as known at common law."

[3] Murder being the same under our law as at common law, there could be no reason why an indictment which would have adequately charged the crime at common law should not be sufficient under our law. A form of indictment that has stood the acid test at common law should stand it under our law; the crime being exactly the same under the two systems. This court has never held differently. What it has held is that the short form of indictment for murder which is provided for in section 1048, Rev. Stat., must be strictly adhered to, if used. Not that it must be used, but that if used it must be strictly adhered to; that the word "willfully" contained in it cannot be left out. But the reason assigned for this is not that this word was essential at common law either in the definition of the crime or in the indictment; but that it is essential in this statutory form of indictment because the statute has made it so. *State v. Williams*, 37 La. Ann. 777. As was said in *State v. Green*, 36 La. Ann. 99:

"This court cannot accept as sufficient less than what the law prescribes should be sufficient."

The "law" which the court here refers to is the said section 1048, Rev. Stat., providing the said short form of indictment. This section reads:

"Sec. 1048. In every indictment for murder it shall not be necessary to set forth the manner in which or the means by which the death

of the deceased was caused, it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased."

The language of this statute, "It shall be sufficient," etc., cannot be construed into a prohibition to use the common-law form of indictment. The terms are permissive, not inhibitive. And it will be observed that, while there was reason to allow a short and simpler form to be used for convenience, and to do away with the technicalities of the common-law form of indictment, which were so many pitfalls in the path of the prosecution, there was no reason why the common-law form should be absolutely prohibited.

[4] But let us grant that said statute amounts to a prohibition, that only this short statutory form can be used, and that every word and letter of it is sacramental, what then? Would it follow that the same sacramentality attaches to the words to be used in the definition? If, so, why?

It is said that what must be alleged must be proved. True, but what is meant by this is that the facts alleged must be proved; not the words by means of which the facts are alleged. The words are not alleged; they are merely used for alleging the facts. And if they were alleged, they could not be proved. How could words be proved? Only as the result of a confusion of thought, therefore, can it be said that the word willful, or willfully has to be alleged and proved.

The argument that since the crime of murder cannot possibly be adequately described by the grand jury to the court in the indictment without the use of the word willful, it necessarily cannot be adequately described or defined to the jury by the judge without the use of this same word, is in like manner based upon a confusion of thought. The office, service, or function of the indictment is

not the same as that of the judge's charge. The two play an entirely different part in the trial of the case. The function of the indictment is to convey to the court information as to certain facts, those constituting the crime. The function of the judge's charge is to explain to the jury the nature of the crime with which the accused is charged. The two being thus entirely different, in fact, having no connection or anything whatever to do with each other, a statute which in express terms refers to the one only cannot, except by a confusion of thought, be extended to the other. Only by a confusion of thought can it be said that by regulating the one the statute necessarily regulates the other. So that, if it be conceded, as for argument we are here doing, that the said section 1048, Rev. Stat., absolutely prohibits the use of the common-law form of indictment for murder, and makes imperative the use of the short form which it provides and declares shall be sufficient, the legal situation is simply that the indictment is thereby regulated, and not that the judge's charge is regulated.

[5] The absence of any and all necessity that the definition of a crime be in the words of the indictment is well illustrated by the circumstance that at common law, while the word "felonious" was essential or sacramental in the indictment (see authorities hereinabove cited), it was not found to be necessary in the definition of the crime, the following being the commonly accepted definition:

"Murder, as defined at common law, is where a person of sound mind and discretion unlawfully kills any human being, in the peace of the sovereign, with malice aforethought either express or implied." 21 Cyc. 703; Wharton, *Crim. L.* (7th Ed.) par. 930; (11th Ed.) par. 418.

Granting, then, for argument, that the use of this short statutory form of indictment is imperative, a thing, we repeat, which this court has never held, and which the mere

permissive terms of the statute would not seem to indicate, and that the word "willfully" therein found is sacramental, as it has been held to be, the reason why this word has been held to be sacramental in this indictment when this statutory form is used is totally inapplicable to the judge's charge to the jury; and when the reason for a conclusion ceases, the conclusion also ceases. That reason, as stated in the several cases hereinabove referred to, is that the words of this statutory form are sacramental because the statute has made them so, a reason that has no application to the judge's charge; for neither said section 1048, Rev. Stat., nor any other law has prescribed the words which the judge may, or shall, use in the task which the law has laid upon him of imparting to the jury the legal notion of the crime charged in the indictment. The only statute applicable to the charge is section 991, Rev. Stat., reading:

"In charging the jury \* \* \* the judge must limit himself to giving them a knowledge of the law applicable to the case."

Nothing is said here of the judge's having to use any particular terms or words, sacramental or other, in thus "giving to the jury a knowledge of the law."

We will mention here that the complaint of the accused is not that the judge did not "give to the jury a knowledge of the law," for he did, barring certain errors hereinafter to be noticed; but that it is, specifically, in the language of the bill of exceptions, that:

"The defendant excepted to the definition of murder given by the court in its charge to the jury, and the court not changing its ruling in said respect, defendant excepted," etc.

The bill does not state in what respect the definition was defective; but we were informed in the oral argument, and the information is again conveyed in the brief, that the ground of complaint was the absence of the word willful from the definition.

[6, 7] We might have ignored this bill of

exception as being defective in not showing that the trial judge was informed at the time the exception was taken in what respect his definition was held to be defective (*State v. Weston*, 107 La. 45, 31 South. 383; 21 Cyc. 852), and we might also have ignored it as presenting merely a moot question, since no law requires a judge to include a definition of murder in his charge, either framed by himself or framed by somebody else; but, inasmuch as the case will have to be tried again, we have thought it advisable to pass upon this bill as if it referred, not solely to the definition attempted by the judge, but to the charge as a whole, as not containing the word willful, or willfully; and this we do in order that the case may not come here again in the event of a second conviction.

Bishop, the most analytical of our writers on criminal law, criticizes the definition of murder given by Hawkins, and in a note reproduces those framed by Coke & Mansfield, and then ventures upon one of his own, and winds up by saying that a definition "in all respects neat, complete, and exact is in the nature of the subject impossible." Bishop, *New Crim. Law*, vol. 2, pars. 732-735. The framing of such a definition is by no means necessary in a charge, or even in a treatise. Witness *Ruling Case Law*, *McClain on Crim. L.*, and others. Bishop's attempt at definition, *ubi supra*, is more in the nature of an explanation; and that is, perhaps, what a judge, in charging a jury, had better confine himself to. But if he does give a definition, his safe course is, no doubt, to do what the learned trial judge did in this case, adopt one that has stood the test of the courts.

[8] Coming back to our discussion, and dealing with the question as if the bill had been reserved to the absence of the word "willful" from the charge, we say that no statute and no rule at common law compels a judge to use any particular words or set of words in fulfilling his duty of "giving to

the jury a knowledge of the law" of murder; that he may use his own words, if they can stand the test of having "given to the jury a knowledge of the law" of murder. *State v. Williams*, 34 La. Ann. 959. It may be a risky venture for him to undertake to do so, and very much safer for him to follow the beaten path traced in the books; but no law compels him. And the sole question that can arise is as to whether he has "given to the jury a knowledge of the law" bearing upon the crime in question.

In the present case, the learned trial judge told the jury that homicide is either "felonious or not felonious"; that "murder is the unlawful and felonious killing with malice aforethought," etc. He defined or explained malice as is done in the books, and said of the word "aforethought" that it "signifies deliberation, design, or premeditation." Of course he might, without harm, have added that the murderous act has to be committed willfully; but this was not necessary, since an act done deliberately, with design or premeditation, cannot possibly be understood to have been done unwillingly. 21 Cyc. 852.

That the word "willful" is not at all indispensable or necessary in the vocabulary of the law of murder superabundantly appears from the books. Nowhere has it been said to be necessary in an indictment, whereas the words "feloniously" and "of malice aforethought" have been held to be essential (21 Cyc. 851, 852; A. & E. E. of L. [1st Ed.] p. 627; Wharton, *Crim. L.* [7th Ed.] par. 1070; [11th Ed.] par. 650; Bouvier, *L. Dict. vo. Felonious*; *vo. Malice Aforethought*—citing 1 Chitty, *Crim. Law*, 242; 1 East, *Pleas of the Crown*, 402); and it does not enter into the definitions of murder by Coke, Blackstone, and Russell. See Bouvier, *vo. Murder*. Nor in the definition by Mansfield. See Bishop, *New Crim. L. note, supra*. Nor in the definition adopted by Cyc. vol. 21, p. 703, as being that of the common law. Nor in that of many other law books. In fact,

the word, as a rule, is not used at all in the expositions of the law of murder. While Bouvier *L. Dict.* says that "feloniously" and "malice aforethought" are essential in an indictment for murder, and cannot be supplied by equivalent words or circumlocutions, it does not give the word "willful" or "willfully" at all, as if not sufficiently important, or technical in character, to be entitled to a place in a law dictionary. Bishop, *New Crim. L. par. 672, p. 382, says:*

*"Malice Aforethought.* We saw in the historical subdivision of this chapter that by the terms of the old statutes which have separated felonious homicides into two degrees of murder and manslaughter the former are distinguished from the latter by being committed of 'malice aforethought,' or, perhaps, to speak more exactly, 'willfully and of malice aforethought.' The word 'willfully,' however, does not appear to add anything to the meaning of the expression; while for still other reasons appearing in 'Criminal Procedure,' there is more than doubt whether it ought to have place in the definition of murder. To ascertain, therefore, whether a felonious killing is murder or manslaughter, we have simply to inquire whether it was committed of 'malice aforethought' or not."

The only reason why this or any other word could be held to be indispensable in a judge's charge to the jury would be because of some statute, or because of its aptness for conveying a meaning or idea not to be conveyed otherwise. But this word "willful," very far from being in law a word conveying a well-known definite meaning or idea, is, on the contrary, a word of most varied meaning in law. So that if it were used for explaining anything, it, in turn, would have to be explained; and the second explanation might have to be longer and more subtle than the first. In 40 Cyc. 939, we find:

"The words 'willful' and 'willfully' are of somewhat varied signification according to context in which they are used in particular cases, and the nature of the subject under discussion or treatment. They are frequently used in the sense of intentionally, or in other words as implying a purpose or design or proceeding from a conscious motion of the will as distinguished from accidentally or involuntarily, and they are accordingly used in the sense of or as

equivalent to willingly, designedly, purposely, obstinately, stubbornly, inflexibly, perversely, voluntarily, deliberately, with set purpose, being governed by the will, without regard to reason, or without yielding to reason."

In support of each of these meanings a list of decisions is cited; all these lists aggregating perhaps 1,000 cases.

What better or more definite idea, then, would this word have conveyed to the jury than was conveyed by the words "designedly" and "deliberately," which were used by the judge, and which are said here to be its equivalents.

[9] We have in this state no common-law crimes. Nothing is a crime which is not made so by express statute. The statute making murder a crime merely names it, without further description or definition. But the word willful is added.

[10] Thus section 784, Rev. Stat.:

"Whoever shall commit the crime of willful murder, on conviction thereof, shall suffer death."

We have not lost sight of the presence of the word "willful" in this statute; we have duly considered what influence it is to be allowed to have in our law of murder, and have concluded that it can have absolutely none. The fact is, the lawmaker who here used the word would have been very much at a loss, we imagine, to explain the necessity of it. We assume it was inserted merely because the crime was so qualified in the English statute. 23 Henry VIII, c. 1, par. 3. See Bishop, New Crim. L. vol. 2, p. 353, par. 625. If that explanation will not hold, we shall have to conclude that the word was added pretty much as we add epithets which do not enlarge the meaning of words, as when we say green grass or white milk, or the poets say wet waves. For inasmuch as murder cannot be otherwise than willful, we add absolutely nothing to the meaning of the word "murder" when we qualify it by "willful." It is just as impossible for mur-

der not to be willful as for a square to be round, or a white cat to be black. Willfulness is a characteristic necessarily and absolutely inherent in murder.

The effect of the addition of a qualifier is to take the noun qualified out of the general class to which it belongs and put it in the class described by the qualifier. Thus the addition of the qualifier "white" to the noun man has the effect of taking this noun out of the general class which includes the yellow, the black, and the red man, and put it in a class including only the white man. And in like manner the effect of this qualifier willful in this statute, if the word had any meaning at all as thus used, would be to take the murder it qualifies out of the class of ordinary murders and put it in a class of murders that would be willful as contradistinguished from ordinary murders. But this cannot be, since we have in our law but one kind of murder. If this word, as we find it in this statute, had any meaning at all, it would imply that we had two kinds of murder, to wit, willful murder, and a kind not willful. Or, at any rate, it would imply that we have two kinds of murder in our law; whereas nothing is better settled than that we have but one kind. That point, as already stated, was decided once for all more than 60 years ago in the case of *State v. Mullen*, cited supra.

And it could not have ever been doubtful. For, as already stated, nothing is a crime in this state unless made so by express statute, and the only statutes we have on the subject of murder are sections 784, 785, and 976, Rev. Stat., and section 1048 already hereinabove transcribed, the former reading:

"Sec. 784. Whoever shall commit the crime of willful murder, on conviction thereof, shall suffer death.

"Sec. 785. There shall be no crime known under the name of murder in the second degree; but on trials for murder the jury may find the prisoner guilty of manslaughter."

"Sec. 976. All crimes, offenses and misde-



measures shall be taken intended and construed, according to and in conformity with the common law of England; and the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatsoever, in the prosecution of crimes, offenses and misdemeanors, changing what ought to be changed, shall be according to the common law, unless otherwise provided."

In *State v. Gaster*, 45 La. Ann. 640, 12 South. 741, this court said:

"This section [976] is the reproduction of the thirty-third section of the act of 1805, with the simple omission of the words 'hereinbefore named,' after the words 'crimes, offenses and misdemeanors.'

"That act, which is the foundation of our penal system, fully defined as well as punished numerous offenses, but in the case of many familiar crimes, such as murder, rape, arson, robbery, burglary, forgery and the like, it simply described them by name without further definition, and in this thirty-third section it supplied this deficiency by providing that the crimes, etc., 'hereinbefore named' shall be 'taken, intended and construed according to the common law of England,' meaning thereby to adopt the definition of the acts constituting those particular crimes which prevailed in the English law at that date."

Unless, therefore, murder in this state is the murder known at common law, the same, and identical, and no other, we are left without any definition whatever of the crime intended to be created by said section 784 under the name of murder; and as a consequence we are left, by operation of familiar principles, without any crime of murder at all in this state.

Therefore the conclusion is absolutely irresistible that there is but one kind of murder known to our law, and that it is the same, precisely and exactly the same, that was known at common law.

Now, if so, why should not the definition given of that crime by such men as Coke, Blackstone, Russell, Mansfield, Wharton, and the vast army of learned judges who in their decisions have had occasion to expound the law of murder, be accepted as sufficient? Why should a verdict be set aside in this state because of the absence from this def-

inition of the word "willful," which all these learned men did not consider was at all necessary in it? Hence a dilemma lies squarely in the path of him who contends that in our law this word "willful" is sacramental in the definition of murder, to wit, either that our crime of murder is not the same crime of murder known at common law, or else that Coke and Blackstone and Russell and Mansfield and other luminaries of the common law were mistaken in their conception of what is a sufficient definition of that crime. We hardly think learned counsel will insist upon either of these propositions, and yet they must either do that or else accept the conclusion that the definition given by the learned trial judge, which was the accepted common-law definition, was sufficient.

[11-13] We pass to the next complaint of accused, that the learned trial judge refused to charge as to involuntary manslaughter.

There is no such crime known to our law as involuntary manslaughter. Why accused should have wanted the learned trial judge to charge as to involuntary manslaughter, a crime which does not exist in our law, is not apparent. At common law there was such a crime, punishable differently from voluntary manslaughter (13 Ruling Case L. vo. 13, p. 785); but in this state we have but one kind of manslaughter, and the question of what punishment shall be imposed for it is left entirely to the judge. If the fixing of the punishment were left to the jury, there would be some use in letting them have the views of the common law on the subject, as it might be helpful to them in arriving at a proper conclusion as to the degree of punishment. But they have nothing whatever to do with the punishment. All they have to do is to decide whether manslaughter (manslaughter of any kind, good, bad, or indifferent) has been committed. Hence they have nothing whatsoever to do with different kinds or degrees of manslaughter. And to charge them

as to something with which they thus have absolutely nothing to do can only have the effect of confusing them. For all practical purposes they might as well bring in a verdict for good, or bad, or indifferent, or meritorious manslaughter as for involuntary manslaughter. At common law there were no degrees of murder. Homicide was either plain murder or manslaughter. In most of our states, and for all we know in England by modern statute, murder is classed with degrees. But in this state we have no degrees of murder, but, as at common law, only plain murder. Now, as well might an accused require the judge to charge as to degrees of murder, because in most of the states and possibly in England to-day there are degrees of murder, as require him to charge as to degrees or kinds of manslaughter, because at common law there were, or are, degrees or kinds of manslaughter. We repeat, all that the judge is required to do in his charge is to "give to the jury a knowledge of the law." And he can do this perfectly by explaining to them what, or under what circumstances, homicide is culpable and when not, without bewildering them with any learned or antiquarian disquisitions on degrees or kinds of murder and degrees or kinds or divisions of manslaughter. They have nothing to do with all that; and their task is sufficiently bewildering already for the judge not to additionally confuse and perplex them with obsolete or irrelevant legal learning.

Early in our reports (*State v. Moore*, 8 Rob. 524) this court said:

"The verdict is in the following words: 'We, the jury, find the prisoner Seaborn, alias Calvin Moore, guilty of manslaughter, in the manner and form as charged in the indictment.' It is contended that it should contain a declaration that the manslaughter was either voluntary or involuntary, and that the murder should have been negatived. Whether the killing was voluntary or involuntary, if unlawful and without malice, it was equally manslaughter. The statute establishes no difference in the grades of the offense. The mode of trial, the rights of the accused, and the punishment of the of-

fender are the same in either event. Thus there appears to us no sound reason why the jury should ascertain the particular description of manslaughter, or announce it to the court."

[14, 15] The next complaint of accused is that the judge said in his charge:

"Hence the word 'aforethought,' used in connection with the word 'malice,' in the definition of murder adds little, if anything, to the meaning of the word 'malice,' standing alone."

It is possible that in this statement the judge was not very far wrong. *Bishop*, New Crim. L. vol. 2, p. 386, says:

"The word 'aforethought' in the definition of murder has been held to mean almost, if not quite, nothing. There is no particular period during which it is necessary the malice should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill, or to do other great bodily harm, is executed the instant it springs into the mind, the offense is as truly murder as though it had dwelt there for a longer period. Still premeditation may be an element showing malice when otherwise it would not sufficiently appear."

But the word "aforethought" qualifying malice is too firmly rooted in the law of murder to be eradicated at this late day. The usage of centuries has consecrated it as the apt word for qualifying malice in the law of murder; and our judges had better conform to the usage. It is a word so technical that it cannot be left out of an indictment; and we agree with the Supreme Court of Mississippi in the following, which we excerpt from *Brett v. State*, 94 Miss. 669, 47 South. 781, to wit:

"'Maliciously' and 'malice aforethought' do not mean the same thing. Malice comprehends ill will, a wickedness of disposition, cruelty, recklessness, a mind regardless of social duty, etc.; while malice aforethought, or premeditated design, has a more intense meaning. They comprehend, not only what is included within the term 'malice,' but in addition thereto mean 'premeditated malice.'"

[16] The next complaint also is well founded. The judge charged:

"But where only one of the parties enters the fight armed with a dangerous weapon, with

felonious intent to make use of the deadly weapon in the fight, and does so against his unarmed antagonist who is fighting with his fists, and kills him, the slayer is not to be heard to say the killing was manslaughter simply because it was done in the sudden heat of passion or anger. In such a case the law would infer or imply that the killing was done with malice, and the homicide would be murder and not manslaughter."

This charge was excepted to under the above-numbered bill.

The deceased was not "fighting with his fists," and the accused did not know deceased was unarmed. Under these circumstances, we agree with the following statement in the defendant's brief:

"The charge of the court, therefore, as to one entering a fight armed with a dangerous weapon, for the purpose of using it on his unarmed antagonist, if it has any application at all, would rather indicate to the jury that the judge thought that the defendant knew deceased was unarmed, when there was nothing in the record to indicate such.

"Defendant contends that a charge of this sort on an abstract proposition of law, which states hypothetical facts which do not fit the case, might easily have a prejudicial effect on the jury, and is reversible error, and asks this court to so hold, and to order a new trial for this reason."

[17] The next complaint is of the following part of the charge:

"To call a man a 'son of a bitch,' and at or near the time the opprobrious epithet is applied to him a violent blow in the face with the fists is inflicted upon him, would be an adequate cause of provocation to a person so insulted and assaulted; and, if the person so outraged should, while under the sudden heat of passion so caused, kill the other, the homicide would amount to nothing more than manslaughter."

Neither party struck at the other. There was evidence that the deceased had thrown his hand behind him, and that, on his doing so, the accused had fired the fatal shot. Under these circumstances, this illustration of a violent blow in the face was inapplicable to the case, and we agree with counsel for accused was calculated to create the impression that accused must have been violently assaulted in order to be in a position to plead self-defense.

[18] The next complaint is embodied in bills of exception 6 and 7, which are to the statement of the judge that for justifying self-defense the overt act on the part of the deceased must have amounted to a felonious assault, as follows:

"Before such a person as I have described can reasonably and honestly entertain this apprehension of danger to his life, or great bodily harm, there must be what the law calls an 'overt act, amounting to a felonious assault,' on the part of the person killed, directed against the body of the person doing the killing. The blow given in defense of the person assaulted must be struck while the danger of death or great bodily harm is either actually or apparently imminent or impending."

In the present connection we agree with what is said in the defendant's brief, as follows:

"Under the decisions it was not necessary for the overt act to amount to a felonious assault. For there to be a felonious assault, the person perpetrating it must have intended a felony, while it is the law that he may have intended no harm at all. It is not what the person assaulting, or apparently assaulting, intends that controls, but what the act he does, taken in consideration with facts which had preceded, caused the defendant to believe deceased intended, and which gave him the right to so believe, that controls. It might well be that deceased committed no assault at all, and that he did not intend to commit any, and yet such facts could exist as would give defendant the right to have taken his life.

"In the case of the State v. Rideau, 116 La. 247, 40 South. 691, an uncle had threatened the life of his nephew the day before. The next morning he entered the bedroom of his nephew, who, without a word, shot him as he entered. Defendant offered to prove the desperate character of his uncle and previous threats, but these were excluded on the ground that there was no overt act. This court said entering another man's sleeping room may be a friendly or a deadly act according to circumstances.

"Referring to his entering the room the court said, 'We think it was a hostile demonstration.' Deceased had a trunk in the room, and it could have been that he was entering to get something out of the trunk. But the intention of the deceased is not the test. The test is what the defendant believed, and what the act of deceased gave him to believe."

The other bills were reserved to the refusal of the judge to give certain special charges, which the judge says he declined to give because already covered in the general

charge, and to certain remarks of the district attorney in his argument to the jury. The remarks were merely argumentative we think; and, as they related to the other accused who was acquitted and is not to be tried again, they need not be noticed further. The other special charges bear upon a point as to which there is no difference of opinion between the judge and counsel. The judge evidently understands the law fully on this point, and is willing to expound it correctly. All that need be said here, therefore, is that perhaps it might be well for him to be more explicit next time, if for no other reason than to forestall objection, and all the incidental trouble.

The judgment and verdict herein are therefore set aside, and the case is remanded to be proceeded with according to law.

See dissenting opinion of LECHE, J., in which MONROE, C. J., concurs, 78 South. 940.

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(78 South. 941)

No. 22729.

GARSAUD v. MANDEVILLE LIGHT &  
ICE CO.

(May 2, 1918. Case Compromised May 31, 1918.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR ⇐819—SUSPENSION OF  
APPEAL—CITATION OF PARTIES—RULE OF  
COURT.

Where an opposition to a receiver's account was dismissed, and the opponent took a devolutive appeal, praying for service and citation on the receiver and all parties in interest, and filed the required bond, and lodged the transcript in the Supreme Court, and, on motion to dismiss appeal for defects in the citation of appeal served on the receiver and for failure to cite certain creditors, showed that he was unaware that all necessary parties had not been cited, he was entitled to the suspension of proceedings to cite the necessary parties, where he was without blame for the failure of the clerk to issue or the sheriff to serve the citations prayed by him, since Supreme Court rule 1, § 8 (67 South.

vil),<sup>1</sup> declares that in the absence of instructions from litigants, citations, etc., shall be omitted from the transcripts.

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; P. B. Carter, Judge.

Proceeding by Octave Garsaud, receiver of the Mandeville Light & Ice Company, upon his final account, with opposition by R. S. Vivian. From a judgment dismissing the opposition, opponent took a devolutive appeal. Motion to dismiss appeal denied, and further proceedings in the case suspended to afford appellant a reasonable opportunity to cite the necessary parties.

Nat W. Bond and E. R. Mabry, both of New Orleans, for appellant. L. C. Moise, of Covington, and Emile Pomes and Joseph Sinal, both of New Orleans, for appellee.

MONROE, C. J. Plaintiff, having been appointed receiver of the defendant company, filed an account, which was opposed by R. S. Vivian claiming to be a creditor of the company, as a holder of certain of its bonds, and, his opposition having been dismissed, he took a devolutive appeal by means of a petition in which he prayed "for service and citation on Octave Garsaud, receiver, and all parties in interest," and obtained an order fixing the amount of the bond and otherwise in accordance with his prayer, after which he filed the required bond, and on August 15, 1917, lodged the transcript in this court. On April 4, 1918 (within four days of that upon which the case was fixed for argument), plaintiff (receiver and appellee) filed an "exception," in which he alleges that "the citation of appeal served on Octave Garsaud is defective—that the same should be addressed to him as receiver"; and that the creditors mentioned in the account and ordered to be paid should have been cited and made parties to the appeal. He therefore prays that

<sup>1</sup> 136 La. viii.

the appeal be dismissed. The opponent (and appellant), alleging that he was unaware that all the necessary parties had not been cited, moves that the case be remanded in order that the omission in that respect may be supplied; and though it is unnecessary to remand the case, we are of opinion that he is entitled to relief, since it does not appear that he is to blame for the failure of the clerk to issue, or of the sheriff to serve the citations as prayed for by him, nor can it be said that he is to blame for not having discovered until the appellee filed his rather belated "exception" that those functions had not been discharged, since rule 1, § 8 (87 South. vii),<sup>1</sup> of this court declares that "in the absence of instructions from litigants, citations and returns, writs," etc., "shall be omitted from the transcripts." *Cockerham v. Bosley*, 52 La. Ann. 65, 28 South. 814; *Bank v. Planting, etc., Co.*, 107 La. 652, 31 South. 1081; *Gagneaux v. Desonier*, 109 La. 460, 33 South. 561. The motion to dismiss is therefore denied; and it is ordered that further proceedings in this case be suspended until the first Monday in October, 1918, in order that appellant be afforded a reasonable opportunity to cite the necessary parties.

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(78 South. 941)

No. 23077.

STATE v. CULBERSON.

(May 27, 1918.)

(*Syllabus by the Court.*)

CRIMINAL LAW § 627(2), 631(2)—SENTENCE — CONSTRUCTION OF STATUTE — "PUNISHABLE"—"ANY CRIME PUNISHABLE WITH IMPRISONMENT AT HARD LABOR FOR SEVEN YEARS OR UPWARDS."

The word "punishable," said of offenders or offenses, means liable to punishment. Hence the expression in Rev. St. § 992, "any crime

punishable with imprisonment at hard labor for seven years or upwards" means any crime or offense for which the offender is liable to punishment with imprisonment at hard labor for seven years or more, even though, in the discretion of the court, the term of imprisonment might be less than seven years.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Punishable.]

Monroe, C. J., dissenting.

Appeal from Twelfth Judicial District Court, Parish of De Soto; John H. Boone, Judge.

Ernest Culberson was convicted of the crime of burglary and larceny, and he appeals. Verdict and sentence annulled, and case remanded to district court.

J. W. Parsons, of Mansfield, for appellant. A. V. Coco, Atty. Gen., and W. M. Lyles, Dist. Atty., of Leesville (Vernon A. Coco, of New Orleans, of counsel), for the State.

O'NIELL, J. The only matter to be determined in this case is the meaning of the expression, in section 992 of the Revised Statutes, "punishable with imprisonment at hard labor for seven years or upwards." The law requires that a person indicted for a capital crime, or for a crime that is punishable with imprisonment at hard labor for seven years or upwards, shall have a copy of the indictment and a list of jurors delivered to him at least two days before the trial.

The defendant was prosecuted on a bill of information for burglary of a barn and for larceny; the penalty for the crime of burglary under section 852 of the revised statutes being imprisonment at hard labor for a term not exceeding ten years.

When the case was called for trial, the defendant objected to going to trial because he had not been served with a copy of the bill of information nor a list of jurors. The objection being overruled, and a bill of ex-

<sup>1</sup> 136 La. viii.

ceptions being reserved to the ruling, the defendant was tried and found guilty as charged.

[1] He was sentenced to imprisonment at hard labor for a term "not less than one year" for the crime of larceny, and for a term "not less than two years" for the crime of burglary, the latter sentence to commence at the expiration of the former.

The reason given, in the statement per curiam, for denying the defendant the right to have a copy of the bill of information and list of jurors delivered to him two or more days before the trial is that the judge construed the expression "any crime punishable with imprisonment at hard labor for seven years or upwards", to mean any crime for which the minimum punishment is not less than seven years of imprisonment at hard labor. Our opinion, on the contrary, is that the expression means any crime for which an offender might be condemned to suffer imprisonment at hard labor for seven years or more. The word "punishable," said of offenses or offenders, means liable to punishment. A crime for which an offender is, on conviction, liable to suffer imprisonment at hard labor for a term that may be more or less than seven years is "punishable with imprisonment at hard labor for seven years or upwards," notwithstanding the term of imprisonment might, at the discretion of the court, be less than seven years.

[2, 3] Our conclusion is that the defendant in this case was entitled to have a copy of the bill of information and list of jurors delivered to him at least two days before the trial.

The verdict and sentence appealed from are annulled, and it is ordered that this case be remanded to the district court to be proceeded with according to law and to the views expressed herein.

MONROE, C. J., dissents.

(78 South. 942)

No. 21224.

AMERICAN TRUST CO. et al. v. CRESCENT ICE CO.

(May 27, 1918.)

*(Syllabus by the Court.)*

JUDGMENT ~~540~~—PLEA OF RES JUDICATA—SUFFICIENCY.

The plea of res judicata will be sustained, on showing that the thing demanded in the suit is the same as that demanded in a former suit, which embraces the same cause of action between the same parties against each other in the same qualities, and where the former suit has been decided by a final judgment from which there can be no appeal.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit to foreclose a mortgage by the American Trust Company against the Crescent Ice Company, in which a receiver was appointed, and in which the Tennessee Coal, Iron & Railroad Company and another, creditors of the Crescent Ice Company, moved to annul the orders appointing a receiver, etc., with exception by defendant of no cause of action and res judicata to the petition of intervention, and with rule by the purchaser against the interveners. Judgment sustaining the exceptions making the rule absolute, and the intervener company appeals. Affirmed.

See, also, 133 La. 247, 62 South. 664; 137 La. 139, 68 South. 386.

Buck, Walshe & Buck, of New Orleans, for appellant. McCloskey & Benedict, of New Orleans, for appellee American Trust Co.

SOMMERVILLE, J. This is a receivership, in which the Tennessee Coal, Iron & Railroad Company et al. intervened and alleged that they were creditors of defendant; that there were errors to their prejudice in three judgments rendered therein; that they were aggrieved thereby; and they appealed therefrom.

An appeal was taken from the order appointing the receiver; the second from an order authorizing the receiver to sell the property belonging to the defendant; and the third from an order of seizure and sale sued out by the plaintiff.

The appeal from the order appointing the receiver was dismissed because it was not taken within ten days after the appointment, and not made returnable within ten days.

The two orders to sell the property were affirmed at appellants' costs. *American Trust Co. v. Crescent City Ice Co.*, 133 La. 247, 62 South. 664.

On the same day that the interveners took the appeals just referred to they filed in the district court, in the receivership proceedings, a petition in which they attacked the three orders above referred to on the same grounds which were argued, submitted, and disposed of by this court on the appeals taken, and reported in 133 La. 247, 62 South. 664.

After judgment was rendered by this court on the appeals, the defendant and other parties filed exceptions to the petition of the interveners in the district court, setting up *res adjudicata* and no cause of action. The purchaser of the property also filed a rule calling upon the interveners to show cause why there should not be erased from the records of the mortgage office the inscription of the suit filed by interveners, which operated as a cloud upon the title. The exceptions and rule were tried at one time, and there were judgments rendered sustaining the exceptions and making the rule absolute.

Interveners appealed from the judgments, and filed one bond. Thereupon defendant moved to dismiss the appeal taken from the judgment on the rule to cancel the lis pendens from the mortgage office. And that motion prevailed. *American Trust Co. v. Crescent Ice Co.*, 137 La. 139, 68 South. 386.

There now remains to be disposed of the

judgment on the exceptions of *res adjudicata* and no cause of action, which were sustained to the petition of interveners.

The exception of *res adjudicata* was tried on the pleadings in the district court; and, after argument, it was sustained. There was no evidence offered on the trial of that exception; and, in this court, the matter was "submitted on the briefs filed in the case of the same name in 133 La. 247, 62 South. 664, and 137 La. 139, 68 South. 386." The matters involved were fully determined in 133 La. 247, 62 South. 664.

The things demanded by interveners in their petition now before the court are the same as those demanded by them on the appeals which they took in this same suit, and which were disposed of in 133 La. 247, 62 South. 664. The two demands embrace the same causes of action, between the same parties, against each other in the same qualities, and there has been a final judgment rendered, and a rehearing refused.

The exception of *res adjudicata* was properly sustained.

The judgment appealed from is affirmed.

(78 South. 943)

No. 21552.

ANDERSON v. CLESI et al.

(May 27, 1918.)

(Syllabus by Editorial Staff.)

MUNICIPAL CORPORATIONS ~~6~~705(10) — PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

In an action by a police traffic officer for injury to his foot by defendant's automobile, *held*, that plaintiff's injury was attributable to his own negligence in suddenly running against the automobile.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Adolph Anderson against N. J. Clesi and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Henry O. Hollander and B. B. Howard, both of New Orleans (James Barkley Rosser, Jr., of New Orleans, of counsel), for appellant. Charles Rosen, of New Orleans, for appellees.

LECHE, J. Plaintiff, a police officer, alleges in substance that while engaged in the performance of his duty, enforcing the traffic regulations of the city of New Orleans at the intersection of Canal and Carondelet streets in said city, defendant Leonard N. Clesi, driving an automobile belonging to his codefendant, N. J. Clesi, came down Carondelet street, and, without sounding any alarm, negligently ran over his (plaintiff's) right foot, knocking him down, and injuring his said right foot and his right arm, causing him great pain and suffering, and inflicting upon him permanent injury, for which he claims damages in the sum of \$5,025.

The defense is a general denial and in the alternative a plea of contributory negligence. The district court rendered judgment in favor of defendants, and plaintiff appeals.

The evidence shows that on September 13, 1911, plaintiff was stationed under an umbrella in the center of the neutral ground on Canal street, on the river side of and a few feet from the car tracks running out Carondelet, across Canal, to Bourbon street; that under the traffic regulations of the city, in force at that time, this crossing, to which plaintiff was assigned, was to be used exclusively for traffic moving from the upper side to the lower side of Canal street; that at the time the accident happened a street car coming out Carondelet street at the proper time and in conformity to the traffic regulation, and most likely after being signaled by the plaintiff, traffic officer, started across Canal street, followed by the automobile driven by the defendant L. N. Clesi, and, when the street car had just passed plaintiff, he noticed a wagon coming across, on the lake side and to the left of the moving street car from the downtown side of Canal street in violation of the

traffic regulation; that plaintiff, with his eyes directed towards the offending wagon and his attention centered upon this threatened violation of the traffic rule, suddenly left his umbrella stand and, darting behind the street car to stop the wagon, ran into and struck the forward right fender of defendant's automobile, and thus caused the injury complained of, to be inflicted upon himself. The evidence shows that the automobile of defendant was moving slowly, some 10 or 15 feet (Clesi says "a length") behind and following the street car; that there was no occasion to give any warning blast of the horn; that plaintiff came upon the automobile so suddenly that it was impossible to stop it before the collision, but that it was stopped within 2 feet of the place where plaintiff ran into it.

Under this state of facts, plaintiff's injury must be attributed to his own negligence.

The judgment appealed from is therefore affirmed.

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(78 South. 944)

No. 22925.

FAVALORA v. NEW ORLEANS RY. & LIGHT CO.

(April 29, 1918. On Application for Rehearing, May 27, 1918.)

(Syllabus by Editorial Staff.)

DAMAGES \$131(5) — PERSONAL INJURY — AMOUNT.

In an action for physical injury sustained by a female passenger on defendant's street car, when it collided with another car, resulting in a nervous shock and some physical discomfort, but not resulting in an abortion, as claimed, a verdict of \$200 increased to \$300.

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Mrs. Catherine Petrie Favalora against the New Orleans Railway & Light Company. Judgment for plaintiff for \$200, and she appeals and asks for an increase of the judgment. Judgment increased to \$300,



with right to defendant to apply for a rehearing.

Woodville & Woodville, of New Orleans, for appellant. Dart, Kernan & Dart, of New Orleans, for appellee.

LECHE, J. Plaintiff sues to recover \$4,550, damages alleged to have been suffered by her as a result of physical injury inflicted upon her while a passenger on one of defendant's street cars in the city of New Orleans.

Plaintiff had taken passage on a Peters avenue car, and when it reached the intersection of Howard avenue and Carondelet street, it collided with a Tulane Belt car, also owned and controlled by defendant. The collision was violent enough to derail the front trucks of both cars, and though plaintiff received no bruises and was not thrown from her seat, the shock to her nervous system brought on certain physical ailments peculiar to women, for which she now claims compensation.

Plaintiff says that when she reached her home she felt very nervous and sick at the stomach, and that she immediately went to bed. She at once summoned her family physician, but was only able to get his attention the following day.

The evidence shows that plaintiff was in a very nervous condition, and that symptoms of abortion manifested themselves. But the proof does not convince us that there actually was an abortion, and it would serve no useful purpose to detail in this opinion the facts bearing upon that issue. Suffice it to say that our appreciation of the evidence is that plaintiff did suffer a nervous shock, underwent some physical discomfort, but that the abortion upon which she largely bases her claim for damages is not established by a preponderance of evidence.

The district court awarded her \$200. She prosecutes the present appeal, and asks for

an increase of the judgment, but we believe the allowance is sufficient. Judgment affirmed at cost of appellant.

O'NIELL, J., is of the opinion the amount of the judgment is inadequate.

On Application for Rehearing.

PER CURIAM. The judgment is increased to \$300 and a rehearing is refused; the right is reserved to defendant to apply for a rehearing from the present amendment. Defendant to pay the costs of appeal.

(78 South. 968)

No. 21817.

INTERSTATE TRUST & BANKING CO. v.  
LIQUIDATORS OF PEOPLE'S BANK  
& TRUST CO.

(May 27, 1918.)

(Syllabus by Editorial Staff.)

1. BILLS AND NOTES  $\S$ 326—SALE—WARRANTY OF GENUINENESS.

Where one bank taking over the assets of another agreed that, if it should renew any obligations taken over such renewal should be an absolute acknowledgment on its part that the note was worth its face value, with interest, etc., the contract nevertheless carried with it a condition that all notes taken over were genuine, since the seller of a note warrants its genuineness, even in the absence of indorsement.

2. CONTRACTS  $\S$ 147(2) — CONSTRUCTION — LANGUAGE AND INTENT.

The language of a contract controls where it is plain, but not where from the contract as a whole and the circumstances surrounding it the language imports a meaning manifestly not intended.

3. BILLS AND NOTES  $\S$ 324—SALE OF NOTES—FORGERIES—DUTY TO REIMBURSE.

Where one bank sold its assets to another in ignorance that two of the notes transferred were forgeries, on discovery of the fact, the seller bank should have reimbursed the buyer bank at once for the price paid for the notes, their forged character having disconnected them entirely from the contract, having reference only to genuine notes, so that reimbursement did not need to await the settlement to be made at expiration of the time allowed by the contract

for the collection of other notes, or for the liquidation of the transferred assets.

**4. BILLS AND NOTES — 324 — SALE OF NOTES — WARRANTY OF GENUINENESS.**

Where one bank bought the assets of another in ignorance of the fact that two of the notes transferred were forgeries, if any loss resulted from the act of the buyer bank in renewing or extending the notes, such loss must fall on the seller bank, and not on the buyer.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by the Interstate Trust & Banking Company against the Liquidators of the People's Bank & Trust Company. Judgment for defendant, and plaintiff appeals. Judgment set aside, exceptions of prematurity and no cause of action overruled, and case remanded for trial.

Howe, Fenner, Spencer & Cocke, of New Orleans, for appellant. E. J. Meral, William C. Dufour, H. G. Dufour, and George Janvier, all of New Orleans, for appellee.

**PROVOSTY, J.** The facts and issues of this case are clearly and succinctly stated in the brief of appellee as follows:

"During the early months of 1911, it became evident that the interests of the stockholders of the People's Bank & Trust Company, then a banking institution in this city, would be best served by the sale of the assets of the said banking company to some other banking institution doing business in this city. Conferences were had with the officers of the Interstate Trust & Banking Company of this city, and it was finally agreed that certain of the assets of the People's Bank & Trust Company, including the bank house and certain mortgage notes, bonds and other obligations, should be appraised by a committee appointed by the two institutions, and that the Interstate Trust & Banking Company should take over the said assets at the figure fixed by the said appraisal committee, and, in addition, should pay to the People's Bank & Trust Company a bonus of \$37,500.

"The agreement was entered into on the 20th day of March, 1911, and a subsequent agreement was entered into on the 21st day of March, 1911, and under the two agreements, the Interstate Trust & Banking Company was to take over, and did take over, certain assets of the People's Bank & Trust Company, which assets were set forth in the list attached to the agreement of March 20th referred to.

The Interstate Trust & Banking Company further agreed to collect such of the obligations as were collectable, and to pay the depositors, and to take care of certain other listed obligations of the People's Bank & Trust Company.

"The agreement stipulated that should the collections on the said notes, mortgage notes, etc., produce a surplus over the appraised figure, then that this surplus should be turned over to the People's Bank & Trust Company.

"Among the listed assets were two notes of Mary Kane for \$1,500 each. It is now alleged by plaintiff that these two notes, which were secured, or were supposed to have been secured, by mortgage passed before James J. Woulfe, were forgeries. Thereupon this suit was filed by the Interstate Trust & Banking Company against the liquidators of the People's Bank & Trust Company. Exceptions of no cause of action and of prematurity were filed and these exceptions were sustained by the trial court and are now before this court on appeal by plaintiff.

"The exception of no cause of action is based on the fact that the two notes referred to were renewed or extended by the Interstate Trust & Banking Company after the making of the agreement. Paragraph 5 of the agreement of March 21st reads as follows:

"It is agreed by the Interstate Trust & Banking Company that in case it shall renew any obligation taken over from the People's Bank & Trust Company, that such renewal shall be an absolute acknowledgment on the part of the said bank, so far as the note is concerned, that it is well and truly worth the face value, with interest; that, on the other hand, should the Interstate Trust & Banking Company decline to renew a note, any losses incurred on that transaction shall be charged up to the People's Bank & Trust Company, to be secured by any excess of assets over liabilities taken over by the Interstate Trust & Banking Company."

"The exception of prematurity is based on the admitted fact that no account has ever been rendered by the Interstate Trust & Banking Company to the liquidators of the People's Bank & Trust Company showing the status of collections made under the said agreements."

[1, 2] The notes which the one bank was selling and the other buying were supposed to be genuine, not forgeries. The contract necessarily carried with it the unexpressed condition that the notes were genuine. The seller of a note warrants its genuineness, even in the absence of indorsement. *Pugh v. Moore, Hyams & Co.*, 44 La. Ann. 209, 10 South. 710; *Massie v. Louque*, 109 La. 775, 33 South. 764; 3 R. C. L. 380. To read the

above-quoted clause as intended to cover forgeries would manifestly be giving it a scope entirely beyond, and outside of, the intention of the parties. Very true, the language of a contract controls, where it is plain; but this is not true where from the contract as a whole and from circumstances surrounding it the language would import a meaning manifestly not intended. C. C. arts. 1945, and 1959. The rule in that connection is expressed in 6 R. C. L. 841, as follows:

"Accordingly it is said that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced no matter what the intention may have been, and that where the meaning of a contract is plain, another meaning cannot be added by implication or intentment. This is the general rule, beyond a doubt, but such required literalism is not to be pushed to the preposterous length of requiring that by its operation the general intention of the parties, as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are servants, and not masters, of a perspicuous intent; they are to be interpreted so as to subserve, and not to subvert, such intent. It is true that the intention of the parties to a contract cannot prevail if directly contrary to the plain sense of the words employed; but when the intention is sufficiently apparent, effect should be given to that intent though some violence is thereby done to the words. The intent of the parties, when manifest, or when ascertained from the contract, must control without regard to inapt expressions or the dry words of the contract, unless that intent is directly contrary to the plain sense of the binding words of the agreement. There can be no doubt that instruments should be liberally construed, so as to give them effect and carry out the intention of the parties. This rule does not seem to conflict with one of Pothier's rules of interpretation, which has been deemed to be consonant with the rules of the common law, that however general the terms may be in which an agreement is conceived, it only comprehends those things in respect to which it appears that the contracting parties proposed to contract, and not others they never thought of."

[3] As the result of their thus proving to be forgeries, or, in other words, mere nothings, the two notes sued on dropped out of the said contract and nothing remained to be done but for the seller bank to reimburse the price paid for them—paid through an error

induced by ignorance of the true situation, a situation of which the seller bank was, indeed, equally ignorant, but from which it cannot profit, not to any extent whatsoever. This reimbursement should have been made at once, amicably. It not having been made, suit was properly brought to enforce it. The forged character of these two notes having disconnected them entirely with the contract (which has reference only to genuine notes), there can be no reason why the reimbursement of the price paid for them should await the settlement to be made at the expiration of the time allowed by the contract for the collection of the other notes, or for the liquidation of the transferred assets.

[4] It goes without saying that if any loss has resulted from the act of the plaintiff in renewing or extending said notes, such loss must fall on defendant and not be borne by plaintiff.

The judgment appealed from is set aside, the exceptions of prematurity and no cause of action are overruled, and the case is remanded for trial; appellee to pay the costs of this appeal.

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(78 South. 969)

No. 21177.

SIVERD v. DUMESTRE.

(May 27, 1918.)

(Syllabus by Editorial Staff.)

1. HUSBAND AND WIFE  $\S$ 272(5)—COMMUNITY PROPERTY — CHARACTER OF HOUSE AND LOT—SUFFICIENCY OF EVIDENCE.

In suit by a divorced wife for settlement of the community acquêts and gains existing between herself and husband during marriage, evidence held to show that a house and lot was bought by the husband with money loaned him by his mother for that purpose, and that the sale to his mother 15 months later was a dation en paiement in reimbursement of the money loaned.

2. HUSBAND AND WIFE  $\S$ 272(5)—COMMUNITY PROPERTY—SAVINGS BEFORE MARRIAGE.

Where a husband invested in a house and lot his savings before marriage, the community,

on dissolution by divorce, owed him the purchase price of the house and lot.

**3. HUSBAND AND WIFE §272(5)—COMMUNITY PROPERTY — CERTIFICATES OF STOCK — SUFFICIENCY OF EVIDENCE.**

In suit by a divorced wife for settlement of the community of acquêts and gains that existed between her and her husband during the marriage, as to five certificates of stock in a home association, evidence held to show that the certificates were bought in the wife's name with money which the husband had given her from time to time as gifts.

**4. HUSBAND AND WIFE §272(5)—COMMUNITY PROPERTY — COMMUNITY EXPENSE — REPAIRS.**

Money expended by a husband in repairs on a house which constituted community property was a community expense to be allowed him on dissolution of community by divorce.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit by Mrs. Alice Siverd against John Dumestre, her husband. From judgment of dismissal, plaintiff appeals. Affirmed.

Lazarus, Michel & Lazarus and David Sessler, all of New Orleans, for appellant. Pierre D. Olivier, of New Orleans, for appellee John Dumestre. Charles J. Théard and Delvalle H. Théard, both of New Orleans, for appellee Emilie Dumestre.

**PROVOSTY, J.** [1, 2] The plaintiff, having obtained a divorce from her husband, sues for a settlement of the community of acquêts and gains that existed between them during their marriage. The main dispute is over a house and lot which the husband purchased during the marriage, and sold to his mother after the plaintiff had abandoned the matrimonial domicile. The testimony of defendant and of his mother and of an intelligent disinterested witness is positive to the effect that the house and lot was bought by the husband with money loaned him by his mother for making the purchase, and that the sale to the mother 15 months later was a dation en

paiement in reimbursement of the money thus loaned. This testimony leaves no doubt whatever on the subject. There is against it nothing but the testimony of the plaintiff herself to the effect that this money which the husband got from his mother represented his savings before his marriage; that her husband told her so. Moreover, if this were true, the plaintiff, for all that appears, would be no better off, since the property is shown to be of the same value as when purchased, and the community would owe the husband the said purchase price, if it represented his savings before his marriage.

[3] Another important item is five certificates of stock in a homestead association of \$100 each. These shares of stock were bought in the name of the wife with moneys which plaintiff says were given her by her husband from time to time as gifts, but which he says were given her merely to be invested as their common savings. The fact that the stock stood in the name of the wife, taken in connection with the further fact that she was allowed to collect them without opposition, apparently, from the husband, makes the scale preponderate in her favor.

[4] Plaintiff claims one-half of \$280 expended by the husband in repairs on the house. This was a community expense on community property.

When plaintiff left the common domicile she carried away with her some of the furniture belonging to the community, and she also collected \$137 belonging to the community.

The bedroom set which she says was given her as a wedding present the evidence shows was not so given.

The trial court dismissed plaintiff's suit, and also the reconventional demand.

Judgment affirmed.

(78 South. 970)

No. 21279.

DELOUCHE v. ROSENTHAL (DELOUCHE,  
Warrantor).

(May 27, 1918.)

*(Syllabus by Editorial Staff.)***1. APPEAL AND ERROR**  $\S$ 878(1)—**REVIEW—PARTIES ENTITLED—APPELLEES.**

Where plaintiff in a petitory suit alone appealed, and defendant and the warrantor did not pray for an amendment, the judgment against them or either of them is not reviewable.

**2. EVIDENCE**  $\S$ 65—**PRESUMPTION—KNOWLEDGE OF LAW** — “EVERY ONE KNOWS THE LAW.”

The presumption that every one knows the law means, particularly if not merely, that every one is presumed to know what laws have been promulgated, and not that every one is in bad faith who does not know how a court of last resort is going to construe the law.

**3. PROPERTY**  $\S$ 10 — “POSSESSOR IN GOOD FAITH”—**STATUTE** — “JUST REASON TO BELIEVE.”

As used in Civ. Code, art. 3451, defining “a possessor in good faith” as one who has just reason to believe he is the owner of the property he possesses, although he may not be in fact, the term “just reason to believe” does not mean having a reason supported by law.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Possessor In Good Faith.]

**4. VENDOR AND PURCHASER**  $\S$ 231(2)—“POSSESSOR IN BAD FAITH”—**STATUTE.**

Under Rev. Civ. Code, art. 3452, declaring that a “possessor in bad faith” is one who has assumed the quality of owner or master well knowing that he has no title or that his title is defective, bad faith is not to be imputed to a purchaser merely because an examination of the records would have disclosed a defect in the vendor's title.

**5. DEEDS**  $\S$ 3—“DEED VALID IN FORM.”

What is meant by a “deed valid in form” or prima facie translativ of property is one that has no defects apparent upon its face.

**6. INFANTS**  $\S$ 39—**MINORS—SALE OF LAND—ORDER—FAMILY MEETING.**

Where property belonging jointly to major and minor children of a deceased was sold by the natural tutrix of the minor children under an order of court, but without the advice of a family meeting to pay succession debts, one of such minors suing after his majority, was entitled to his interest in the property so sold.

**7. INFANTS**  $\S$ 41—**MINORS—SALE OF LAND—VALIDITY OF DEED—BAD FAITH.**

In such case the purchaser at such sale, by the tutrix acquired a title prima facie valid, and was not a purchaser in bad faith merely because his title was invalid.

**8. REAL ACTIONS**  $\S$ 8(4, 5) — **PETITORY ACTIONS—JUDGMENT—RENTS—IMPROVEMENTS—POSSESSION.**

In a petitory suit by one whose interest in land had been sold by his mother as his natural tutrix during his minority, defendant, a possessor in good faith, was properly adjudged to pay rents and revenues only from the date of the judicial demand and permitted to retain possession until the improvements were paid for; and plaintiff had no right to elect whether he would pay for the improvements or require the defendant to remove them.

**9. DESCENT AND DISTRIBUTION**  $\S$ 125—**SUCCESSION—DEBTS OF SUCCESSION—LIABILITY OF HEIR.**

A petitory suit by one whose one-fourth interest in a succession had been sold by his mother as his natural tutrix during his minority against the purchaser for his share was an acceptance of the succession, and rendered plaintiff liable for one-fourth of the debts of the succession.

**10. LIMITATION OF ACTIONS**  $\S$ 83(2) — **PRESCRIPTION—DEBT OF SUCCESSION—POSSESSION OF PROPERTY IN SATISFACTION OF DEBT—SUSPENSION.**

The prescription against the debt of a succession for which the property was sold to the creditor was interrupted or suspended while the creditor held possession of the property in satisfaction of the debt.

**11. REAL ACTIONS**  $\S$ 8(3) — **PETITORY ACTIONS—RECOVERY—REIMBURSEMENT TO DEFENDANT.**

In a petitory suit to establish title to a fourth interest in a tract of land in defendant's possession which had been adjudicated to plaintiff's mother in part satisfaction of a debt from her husband's succession and by her conveyed to defendant, plaintiff could not be condemned to reimburse the defendant for a debt due by the succession to his mother, defendant having no right to subrogation to the claim of the mother against the succession, and no such right being claimed by answer.

Provosty, J., dissenting in part.

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; W. T. Cunningham, Judge.

Petitory suit by Numa Delouche against Philip Rosenthal, coupled with a claim for rent and revenues from the property, in

which defendant filed a reconventional demand and called his vendor, Mrs. Fanny Delouche, in warranty. Judgment for plaintiff, including a judgment for rents and revenues, and judgment for defendant on his reconventional demand for improvements, taxes, etc., and against his warrantor, and plaintiff appeals. Judgment amended, and as amended affirmed.

Smith & Dismukes, of Natchitoches, for appellant and Fanny Delouche. Breazeale & Breazeale, of Natchitoches, for appellee.

O'NIELL, J. Judgment was rendered in favor of the plaintiff recognizing his title to a fourth interest in two tracts of land in the defendant's possession, according to the prayer of plaintiff's petition, and allowing him a fourth of the rents and revenues of the property from the date of judicial demand. Judgment was rendered at the same time in favor of the defendant on his demand in compensation: (1) For a fourth of the value of the improvements he had made to the property; (2) for a fourth of the amount he had paid for taxes on the property; (3) for a fourth of a certain debt due to the defendant by the succession of the plaintiff's father, which debt was a part of the consideration for which one of the tracts of land was bought by defendant from the succession; and (4) for a fourth of a certain debt that the plaintiff's deceased father had owed to the widow, plaintiff's mother, who was called in warranty in this suit. The warrantor was condemned to return to the defendant a fourth of the price he had paid for the tract of land he had bought from her, which she had bought from the succession of the deceased father of plaintiff. Pleas of prescription of three, five, and ten years urged by the plaintiff against the debt claimed by defendant were overruled. It was decreed that the defendant was a possessor in good faith, and there-

fore should not be required to deliver to the plaintiff his fourth interest in the property until payment of the judgment of compensation.

[1] The plaintiff alone has appealed; and, as the defendant and his warrantor have not prayed for an amendment, the judgment against them, or either of them, is not now subject to review.

The appellant in his assignment of errors makes the following complaints, viz.:

(1) That the defendant should be declared a possessor in bad faith, and, as such, should be condemned to pay the fourth of the rents and revenues for the entire period of his possession, should not be allowed compensation for the improvements unless plaintiff elects to keep them, and should not be allowed to retain plaintiff's property until payment of compensation.

(2) That plaintiff should not be condemned to pay as compensation the fourth of the debt claimed by defendant against the succession of plaintiff's father.

(3) That plaintiff should not be condemned to pay to defendant the fourth of the debt that plaintiff's father owed his mother.

(4) That, if plaintiff's father ever owed the debts claimed by defendant, they are prescribed.

The land in question belonged to the plaintiff's father, being a part of his separate estate. He died in 1894, leaving a widow, two major daughters, and two minor sons, the plaintiff being one of them. The widow qualified as natural tutrix of her two minor children in 1896, and, alleging that she was administering the estate as tutrix, obtained an order to sell the property to pay the creditors of the succession, who were demanding payment. Among the debts was one of \$1,000 due to the widow for her separate funds received and spent by her husband, and a mortgage note and an open account due to the defendant. No administrator was appointed

nor family meeting held to authorize the sale. One of the tracts of land in question was adjudicated to the defendant at a price exceeding the amount of the debt due him, and he paid the excess in cash. The property had been inventoried as community property, for the record showed nothing to the contrary; but the evidence in this case shows that it was a part of the separate estate of the deceased. The other tract of land was adjudicated to the widow, in part satisfaction of the debt due her; and she sold the property to the defendant five years afterwards. This suit was filed in 1914, when the plaintiff was between 26 and 27 years old, the defendant having held actual possession, as owner longer than 10 years, under titles apparently conveying the property.

[2, 3] The most important question presented is whether the defendant's possession was in good or bad faith. It is not denied that he was in good faith in the broad sense that he bought the property in all fairness, for an adequate consideration, and believed he acquired a valid title. The argument of the learned counsel for appellant is that the defendant's faith in the validity of his title was founded, not upon ignorance of any fact, but upon ignorance of the law. They say in their brief:

"Plaintiff contends that Rosenthal is in bad faith legally, and grants that he may have been in the utmost moral good faith. His mistake was one of law, and, as all are presumed to know the law, he is bound to have known the defects of his title. *'Ignorantia legis non excusat.'*"

The presumption that every one knows the law means, particularly if not merely, that every one is presumed to know what laws have been promulgated, not that every one is in bad faith who does not know how a court of last resort is going to construe the law. If the maxim, *"Ignorantia legis non excusat,"* applies to a possessor who has bought the property fairly, for an adequate consideration

and in ignorance of any fact affecting the validity of his title, we can never say that a defendant in a petitory action was a possessor in good faith if we declare his title invalid. Under that doctrine every unsuccessful appellant would be held to have taken his appeal in bad faith.

Article 3451 of the Civil Code defines the "possessor in good faith" as one who has just reason to believe he is the owner of the property he possesses, although he may not be in fact, and gives the illustration of one who buys property that he supposes belongs to the seller although in fact it belongs to another. Having "just reason to believe" does not mean having a reason supported by law. If it did, the only possessor in good faith would be one whose belief or faith in the validity of his title is well founded.

[4, 5] A "possessor in bad faith" is one who has assumed the quality of owner or master, well knowing that he has no title, or that his title is vicious and defective. R. C. C. 3452.

Bad faith is not to be imputed to a purchaser merely because an examination of the records would have disclosed a defect in the vendor's title. What is meant by a deed valid in form, or *prima facie* translatif of property, is one that has no defect apparent upon its face. *Pattison v. Maloney*, 38 La. Ann. 885; *Heirs of Ford v. Mills & Phillips*, 46 La. Ann. 339, 14 South. 845; *Guarantee Trust Co. v. Drew Inv. Co.*, 107 La. 252, 31 South. 736; *Blair v. Dwyer*, 110 La. 337, 34 South. 464.

[6, 7] Appellant relies upon the decision in *Deshotels v. Lafleur*, 134 La. 1052, 64 South. 905, where property that belonged jointly to major and minor children of the deceased, as in this case, was sold by the natural tutrix of the minor children, at public auction, under an order of court, to pay succession debts, without the advice of a family meeting.

The decision cited is authority for the

judgment rendered in this case, recognizing the plaintiff's title to a fourth interest in the property sold by the tutrix; but it is also authority for holding that the purchaser at such sale acquired a title *prima facie* valid, and is not a purchaser in bad faith merely because his title was invalid. On the question of good or bad faith the decision is entirely against the contention of appellant; for the court held that, as to the heirs of age, the sale should be given the effect of a probate sale, conveying a *prima facie* valid title, under which the purchaser, in good faith, was protected by the prescription of ten years.

[8] Our conclusion is that the defendant was and is a possessor in good faith, and that the judgment is correct: (1) In so far as it condemns him to pay rents and revenues only from the date of judicial demand; (2) in so far as it denies the plaintiff the right to elect whether he will pay for the improvements or require the defendant to remove them; and (3) in so far as it permits the defendant to retain possession until the improvements are paid for.

[9] We find no merit in the second complaint in the assignment of errors; that is, that the defendant should not be compensated for a fourth of the debt which the plaintiff's father owed the defendant and which was a part of the purchase price of one of the tracts of land in question. This suit was an unconditional acceptance of the succession on the part of the plaintiff, and rendered him liable for one-fourth of the debts of the succession. *R. C. C. 988; Brashear v. Conner*, 29 La. Ann. 347; *Hickman v. Dawson*, 33 La. Ann. 442; *Ledoux's Heirs v. Lavedan*, 52 La. Ann. 354, 27 South. 196.

[10] Our opinion is that prescription against the debt for which the property was sold to the defendant was interrupted or sus-

pended while the defendant held possession of the property in satisfaction of the debt. It is well settled that the holding of property in one's possession as a pledge to secure a debt suspends prescription against the debt, whether the pledge be statutory or conventional; and we think the same rule should apply to the holding of possession by purchase of property in satisfaction of a debt. Article 3178, *R. C. C.*, referring to the contract of *antichresis*, declares that a debtor cannot regain possession of immovable property that has been pledged without having paid the debt; and we think the same rule should apply to a debtor whose property has been sold in satisfaction of a debt, and to his legal representative who has assumed the debt.

[11] The third complaint in the assignment of errors is well founded. We see no reason whatever for condemning the plaintiff to reimburse the defendant for a debt that was due by the succession of the plaintiff's father to the plaintiff's mother. The defendant had no right of subrogation to the claim of the plaintiff's mother against the succession of her husband; nor does it appear that the defendant claimed such right in his answer to this suit. The balance due on the debt was \$171.37.

The judgment appealed from is amended by reducing the amount allowed the defendant on his demand in compensation \$171.37, and, as amended, the judgment is affirmed. The defendant, Rosenthal, is to pay the costs of appeal.

PROVOSTY, J., does not concur in the view expressed as to presumption of knowledge of law, but otherwise concurs in the decision.



(78 South. 973)

No. 23116.

STATE v. PENTEN et al.

In re PENTEN et al.

(May 27, 1918.)

*(Syllabus by the Court.)*STATUTES §=118(1)—SUBJECT AND TITLE—  
DISTURBING THE PEACE.

The title to Act No. 31 of 1886, p. 40, expresses the object embraced in the act. The act defines disturbances of the peace in public streets and on highways near private houses, etc.

Alfred Penten and others were convicted of using loud, vociferous, vulgar, and indecent language in a public place in a manner calculated to alarm and disturb the inhabitants, their motion to quash the indictment was overruled and they apply for writs of certiorari and prohibition. Application denied.

Fred J. Heintz and A. D. Schwartz, both of Covington, for applicants. A. V. Coco, Atty. Gen., and J. Vol. Brock, Dist. Atty., of Franklinton (Vernon A. Coco, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Relators were charged with and convicted of using loud, vociferous, vulgar, and indecent language in the streets of Talisheek, a public place, in a manner calculated to alarm and disturb the inhabitants thereof.

They moved to quash the indictment on the ground that Act 31 of 1886, p. 40, under which they were charged, is unconstitutional, in that the object of the act is not expressed in the title.

The motion was overruled; and, as defendants have no appeal, they have invoked the supervisory jurisdiction of the court, and ask that the judgment of the district court be reversed, and that it be prohibited from proceeding further.

The objection to the act is not well founded. The title reads:

"Relative to disturbances of the peace in public streets, on highways, in or near private houses, defining said offense, and providing for the punishment of the same by fine or imprisonment, or both."

It is argued by relators that because disturbances of the peace in public places are included in the act, together with public streets and highways, that the act is broader than its title.

The object of the act is to punish disturbances of the peace, and that object is sufficiently expressed in the title "relating to disturbances of the peace in public streets, on highways, in or near private houses." Streets and highways are public places, and public places are therefore embraced in the title.

Public places are defined in section 2 of the act to be:

"Any public road, street, or alley of a town or city, inn, tavern, store, grocery, workshop, or any place to which people commonly resort for purposes of business, recreation or amusement, and places of public worship."

The definition is specially provided for in the title.

And the disturbance of the peace is further defined in the act to be that any person who shall go into any public place, into or near any private house, or along any public street or highway near to any private house, and who shall use loud and vociferous or obscene, vulgar, or indecent language, or swear or curse, or expose his person, or rudely display or wantonly or maliciously discharge or use any pistol or other deadly weapon in such public place, or upon such public street or highway, or near such private house, in a manner calculated to disturb or alarm the inhabitants thereof, shall, etc.

Defendants are charged with having used loud, vociferous, vulgar and indecent language on the streets of Talisheek, in the exact language of the statute, and the same language is in the title of the act. They are

not charged with disturbing the peace in an inn, tavern, etc.; and they have no interest in attacking the act, because inns, taverns, etc., are included in public places in the act.

The rule issued herein is recalled; and the application of relators for writs is denied, at their cost.

(78 South. 973)

No. 23060.

STATE v. EBARBO.

(May 27, 1918.)

(Syllabus by the Court.)

**1. DISTRICT COURTS — LOUISIANA — JURISDICTION IN CRIMINAL CASES.**

The district courts throughout the state, except in the parish of Orleans, have unlimited and exclusive original jurisdiction in all criminal cases, except such as may be vested in the other courts authorized by the Constitution.

**2. JUVENILE COURTS — CONSTITUTIONAL PROVISIONS.**

District courts, when in session under the act known as the Juvenile Court Act, are known, for convenience, as juvenile courts.

**3. DISTRICT COURTS — JURISDICTION AS JUVENILE COURTS.**

District courts, outside of the parish of Orleans, sitting as juvenile courts, have jurisdiction, except for capital crimes, of the trial of all children under 17 years of age, and who may be charged in said courts as neglected or delinquent children.

**4. DELINQUENT CHILD — CONSTITUTIONAL DEFINITION.**

The term "delinquent" child means any child 17 years of age and under who, among other things, violates any law of the state, or any ordinance of any village, town, city, or parish of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delinquent Child.]

**5. INFANTS — MINORS — LOUISIANA DISTRICT COURT — CRIMINAL JURISDICTION.**

A person over 17 years of age must be charged and tried in the district court, although at the time of the commission of the offense he may have been under 17 years of age.

O'Niell, J., dissenting.

Appeal from Twelfth Judicial District Court, Parish of Sabine; John H. Boone, Judge.

George Ebarbo was convicted of larceny, and he appeals. Affirmed.

Don E. So Relle, of Many, for appellant. A. V. Coco, Atty. Gen., and W. M. Lyles, Dist. Atty., of Leesville (Vernon A. Coco, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Defendant was indicted for larceny, tried, convicted, and sentenced and he appeals.

Defendant excepted to the jurisdiction of the district court on the ground that he was not 17 years of age when the act charged in the bill of indictment is said to have been committed, and that the court was without jurisdiction to try him except as a juvenile.

It appears that the defendant was born January 25, 1901, and attained his seventeenth birthday on January 25, 1918. He was indicted by the grand jury March 7, 1918, for the larceny of a horse on the 6th day of December, 1917. He was tried on March 15, 1918. The defendant was not indicted until after he had attained his seventeenth year, and as his trial took place subsequent to that time, the district court had jurisdiction; and the district court, sitting as a juvenile court, did not have jurisdiction. The exception to the jurisdiction of the court was properly overruled.

[1-4] Article 118 of the Constitution provides in section 2, in so far as this case is concerned, that:

"Each district court outside of the parish of Orleans, when in session under the provisions of this act, shall be known, for convenience, as the juvenile court," etc.

And section 3 provides, in part, as follows:

"The juvenile court in the parish of Orleans, and the district courts outside of said parish, sitting as juvenile courts, shall have jurisdiction, except for capital crimes, of the trial of all children under seventeen years of age, who may be charged in said courts as neglected or delinquent children. \* \* \* The term 'delinquent' child shall mean a child seventeen years of age and under, \* \* \* who \* \* \* violates any law of the state, or any ordinance of any village, town, city, or parish of the state."

The juvenile courts therefore have jurisdiction "of the trial of all children under seventeen years of age." As defendant was more than 17 years of age at the time of his trial, the juvenile court did not have jurisdiction; and the district court had "unlimited and exclusive original jurisdiction in all cases, except such as may be vested in the other courts authorized by this Constitution."

[5] The case of an offender over 17 years of age is not an exception, and the district court therefore had jurisdiction of this case.

Defendant was both charged and tried after having attained the age of 17 years, and the only court with jurisdiction was the district court in which he was charged and tried.

In the case of *State v. Lanassa*, 125 La. 687, 51 South. 688, it was held that the juvenile court was without jurisdiction to try boys who had attained 17 years of age, and were under 18.

The judgment appealed from is affirmed.

O'NIELL, J., dissents.

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(78 South. 974)

No. 21559.

**SALAUN v. CONSOLIDATED REALTY & MFG. CO., Limited.**

(May 27, 1918.)

(Syllabus by Editorial Staff.)

**MASTER AND SERVANT § 82(2)—EMPLOYÉS AS PRIVILEGED CREDITORS—"CLERK"—"SECRETARY."**

The general manager of a corporation, who, as such, superintended generally its operations, the foreman of its lumber yard and planing mill, and its supervisor of construction and draughtsman were not privileged creditors of the company under Rev. Civ. Code, art. 3252, which accords a privilege to debts due for wages of servants and the salaries of secretaries and clerks and other agents of that kind, since no one of the employes was a "clerk" or "secretary."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Clerk; Secretary.]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Walter Salaun against the Consolidated Realty & Manufacturing Company, Limited, wherein a receiver was appointed, and, he having filed his account, the Whitney Central National Bank, as assignee, filed opposition, asking to be placed on the account as a privilege creditor, as did Louis Ward on a claim of his own. From the judgment recognizing them only as ordinary creditors, opponents appeal. Affirmed.

James Barkley Rosser, Jr., of New Orleans, for appellant Louis Ward. Hall, Monroe & Lemann and Watts K. Leverich, all of New Orleans, for appellant Whitney Central Nat. Bank, assignee. Lazarus, Michel & Lazarus and Legler & Gleason, all of New Orleans, for appellee Meyer S. Drefus, Receiver.

**PROVOSTY, J.** The receiver herein having filed the account of his administration, the Whitney Central National Bank, as assignee of the claim of George N. and Robert N. Templeman, filed opposition to same, asking to be placed on same as privilege creditor, and Louis Ward on a claim of his own did the same; and these opponents have appealed from a judgment recognizing them as only ordinary creditors.

The claims are for salaries. George Templeman was general manager. As such he superintended generally the operations of the company. Robert was foreman of the lumber yard and planing mill. Ward was supervisor of construction and draughtsman.

The privilege is claimed under article 3252, C. C., which accords a privilege to debts due for

"4. The wages of servants.

"5. The salaries of secretaries, clerks and other agents of that kind."

In *Stevens v. Sawyer*, 3 La. Ann. 423, it was held that the scope of this article does not extend to the editors, reporters, printers,

and carriers of a newspaper establishment. And in *Lewis v. Patterson*, 20 La. Ann. 294, that it does not extend to a foreman in a job printing office. And in *Weems v. Delta Moss Co.*, 33 La. Ann. 973, that it does not extend to an agent soliciting the sale of goods at a fixed salary. While in *Tete v. Lanoux*, 45 La. Ann. 1343, 14 South. 241, a person employed at a fixed salary by a commission merchant "as a sugar broker" to sell all the products consigned to the employer, and also "to exert all his influence" to promote the interest of his employer, and to write all letters concerning the market, and to make out all account sales, was "a clerk in the ordinary acceptance of the term." A clerk was there defined to be "one who hires his services to an employer at a fixed price under a stipulation to do and perform some specific duty or labor which requires the exercise of skill." But that decision was made in connection with article 2007, C. C., reading, "All contracts for the hire of labor, skill and industry, without any distinction;" and the drift of the argument was to distinguish between a person so hired and a broker, so that while the definition given of a clerk might appear to be applicable to the instant case, the decision itself is not at all in point.

The dominating idea of the other decisions hereinabove referred to is that privileges are stricti juris, and that the employes there named are not clerks, secretaries, or other agents of that kind, within the ordinary meaning of those terms. And we must now hold the same of the kinds of employes in question in the present case. While the secretary of a corporation sometimes exercises the functions of manager (*Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473, 34 N. E. 289; *Hannover Nat. Bank v. American Dock Co.*, 75 Hun, 55, 26 N. Y. Supp. 1055), and, conversely, the manager may fulfill the duties of secretary; still, as ordinarily understood, the manager is not clerk or secretary, and

the clerk or secretary is not manager. Nor is the foreman of the yard either clerk or secretary. Nor, strictly speaking, is a supervisor of construction such.

Judgment affirmed.

(78 South. 975)

No. 23044.

STATE v. BARNHART.

(May 27, 1918.)

(Syllabus by the Court.)

1. HOMICIDE §142(6)—DATE OF OFFENSE—PROOF.

Where, upon a trial for murder, the indictment charges the offense as committed upon a certain day, and a witness for the prosecution is allowed to testify, over objection, that the deceased was killed prior to a certain earlier date, the objection is properly overruled, since, time not being of the essence of the crime charged, the state is not restricted in its evidence to the date set out in the indictment, but is at liberty to show that it was committed at any time prior to the finding of the indictment and within the period of prescription.

2. CRIMINAL LAW §599—HOMICIDE §142(6)—TIME OF OFFENSE—EVIDENCE—CONTINUANCE.

But where, upon a trial for murder, the state introduces evidence showing that the offense was committed several months earlier than as charged, though such evidence may properly be admitted, for the reason that it is not necessary to give a specific date, as time is not of the essence of the offense, that reason is not sufficient to sustain a ruling refusing the defendant a delay to enable him to prepare a defense against a charge other than that which he has been called into court to meet.

3. CRIMINAL LAW §1170½(5)—RULING ON CROSS-EXAMINATION—REVERSIBLE ERROR.

A ruling sustaining an objection to a question propounded, on cross-examination, to a state witness in a criminal case, may be erroneous, and yet not show such prejudice to the rights of the defendant as to warrant the setting aside of the conviction.

4. CRIMINAL LAW §720½, 1111(3)—ARGUMENT OF PROSECUTING OFFICER—REVIEW—CONCLUSIVENESS OF RECORD.

A prosecuting officer is entitled to form, and to express to the jury in a criminal case, his own opinion as to what has been made evident on the trial, and it is for the trial judge to determine whether he keeps within the record.

The mere recital, in a bill of exceptions, that the district attorney stated that such a fact was evident, does not enable the court to determine whether the fact was evident or not, and, in the absence of the entire record, with the evidence, the statement of the trial judge that the district attorney kept within the record is conclusive of that question.

Appeal from Second Judicial District Court, Parish of Bossier; John N. Sandlin, Judge.

Nelse Barnhart, alias Big Boy, was convicted of murder, without capital punishment, and sentenced therefor, and he appeals. Verdict and sentence set aside, and cause remanded.

Murff & Mabry, of Shreveport, for appellant. A. V. Coco, Atty. Gen., and Harmon C. Drew, Dist. Atty., of Minden (Vernon A. Coco, of New Orleans, of counsel), for the State.

MONROE, C. J. This is an appeal from a conviction of murder, without capital punishment, and sentence therefor.

It appears that, on the trial, a witness called by the state was asked "if deceased was killed, and, if so, when and where?" that defendant objected to his testifying to any other date than February 5, 1918, as charged in the indictment, on the ground that his defense was an alibi, and he was not prepared with respect to any other date, which objection was overruled "because" (as stated by the judge) it was "not necessary to give specific date, as time was not of essence in charge of murder"; and, the witness having testified that deceased was killed "some time before Christmas, 1917" a bill was reserved, and defendant (according to the recitals of another bill) "immediately moved the court for a continuance \* \* \* until such time as he could prepare his defense to meet the date of some time before Christmas in the year 1917," as fixed by said witness, whereas the indictment specified February 5, 1918, and which said indictment

the district attorney did not offer to amend, but stood on said date of February 5, 1918, regardless of the evidence showing the date of the death of the deceased to be some time before Christmas in the year 1917; that defendant was not prepared to meet the charge of murder both of date "some time before Christmas in the year 1917" and also on the 5th of February, 1918, for the reason that the state's case depended entirely on circumstantial evidence, and the defense was an alibi, \* \* \* but the court refused the continuance, and ordered the trial to proceed, for the following reasons, to wit: "Same reason as in bill 1."

[1, 2] It is true that, although some time must be stated in an indictment charging murder, the state is not restricted in its evidence to the date charged, but may prove that the crime was committed upon any other day, prior to the finding of the indictment and within the period of prescription. 22 Cyc. 451; Marr's Crim. Jur. of La. p. 400; R. S. 1063; Bishop's Cr. Pr. § 400; State v. Kane, 33 La. Ann. 1269; State v. Anderson, 136 La. 261, 66 South. 966. But it does not follow that, because the state enjoys that privilege, the defendant has no rights which are to be considered in that connection. R. S. 1047, after recapitulating certain variances between allegations and proof, in criminal cases, declares that:

"It shall be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense, to order such indictment to be amended according to the proof; \* \* \* the trial to be had before the same or another jury, as the court shall think reasonable; and, after any such amendment, the trial shall proceed: \* \* \* Provided, that in all such cases, where the trial shall be so postponed, the witnesses shall be bound to attend," etc.

From which it is evident that the law-maker has thought it quite within the range of possibility that, in a case of the character thus provided for, a defendant might be tak-

en by surprise, and at serious disadvantage, and that the interests of justice and fair play might require that he be granted a delay in order to prepare his defense with reference to the change in the charge that he had come into court to meet. In *State v. Wallman*, 31 La. Ann. 147, in referring to such a situation, this court said:

"We are reminded that 'the simplest defense which the accused has to a charge against him is the proof of an alibi,' and we are asked: How would such a right be protected if the time laid in the indictment be considered as immaterial? That right would, under all circumstances, be protected by the court; for, were the evidence to establish that the offense was committed on a day different from that laid in the indictment, and were the indictment amended so as to correspond with the evidence, the prisoner would not, and could not, be denied a reasonable delay to prepare any reasonable defense, which he may really have, or believe he has, against the unexpected, or, at least, apparently unexpected, change in the indictment."

It may be that the learned trial judge had excellent reasons for refusing to grant the continuance in this case, but the only reason that he has spread upon the record is that which we have stated, "not necessary to give specific date, as time not of essence in charge of murder," which, though a sufficient reason for admitting testimony tending to show that the offense in question was committed at some other time than as charged in the indictment, was not, in our opinion, a sufficient reason for refusing to grant defendant a delay for the preparation of his defense against the charge as thus brought out in the testimony, and which, in the light of that testimony, might have referred to a crime committed more than a year before the finding of the indictment, since a long period is known to have elapsed before Christmas in the year 1917. There was reversible error in the ruling complained of.

[3] Another bill was reserved to the ruling of the court in sustaining an objection to the following question, propounded, on cross-

examination, by defendant's counsel, to a deputy sheriff, who had testified that he had arrested defendant, to wit: "Didn't you ask defendant, at the time you arrested him, if he killed the deceased, and didn't he say 'No'?" The question appears to have been germane to the testimony given upon the examination in chief, and we see no valid objection to it. On the other hand, the ruling complained of discloses no such prejudice to the defendant as, of itself, to warrant the setting aside of the conviction.

[4] The prosecuting officer, in his opening argument, made the statement that the deceased "was shot in the head, and this negro (pointing and referring to the defendant) evidently ran, after he killed the deceased," whereupon defendant's counsel objected to the word "negro" as prejudicial to defendant, and further objected to the remark on the ground that there was nothing in the record to show that any one ran after the shooting.

The statement per curiam is:

"District attorney did not go out of record, as evidence showed defendant was negro, and no appeal was made to race prejudice."

The defendant being a negro, the jury were probably as well aware of it as the district attorney, and no reason suggests itself why his being so characterized should have made any change in their feeling towards him. In order to determine why it was evident to the district attorney that defendant "ran, after he killed the deceased," we should have to know something more of the testimony adduced; how he knew, for instance, that defendant had killed the deceased. As the matter is presented, we find no reason to suppose that there was any error in the ruling of the court.

Another bill raises the same point about the characterization of defendant as a negro, and the ruling was the same.

For the reasons assigned in considering the two first bills, it is ordered and adjudged

that the verdict and sentence be set aside, and the case be remanded, to be proceeded with according to law.

(78 South. 977)

No. 21723.

PFEIFFER v. NIENABER.

(May 27, 1918.)

(*Syllabus by Editorial Staff.*)

EVIDENCE §—441(8)—PAROL EVIDENCE—VARYING STIPULATIONS OF ACT OF SALE.

Under Civ. Code, arts. 2236, 2276, declaring that the authentic act is full proof of the agreement contained in it against the contracting parties, and that parol evidence may not be admitted against or beyond what is contained therein nor on what may have been said before or at the time of making it, parol evidence was inadmissible to prove an independent verbal agreement to divide the profits arising from the resale of real property where the act of sale conveyed the property to defendant for a stated consideration with no stipulation outside of the ordinary warranty and subrogation clauses.

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by William Pfeiffer against Jacob Nienaber. Judgment for defendant, and plaintiff appeals. Affirmed.

Lyle Saxon, of New Orleans (Sol Weiss, of New Orleans, of counsel), for appellant. Dart, Kernan & Dart, of New Orleans, for appellee.

LECHE, J. Plaintiff sues to recover \$2,100 which he claims from defendant, as the result of an agreement to share equally in the profits of a sale of immovable property situated in the city of New Orleans.

He alleges, in substance, that on June 9, 1899, he purchased from R. J. Goebel three lots of ground and the improvements thereon; that, although the title was placed in his own name, the said purchase was made for joint account of himself and defendant;

that on February 27, 1904, he sold his interest in said property to defendant, but that previous to the said sale of February 27, 1904, defendant had verbally agreed with him that he (defendant) would build a home on said property, and had also agreed that in case he sold the property he would pay to plaintiff "one-half of the profits of whatever sums he might realize thereafter" by such sale. Plaintiff further alleges that defendant sold said property on June 30, 1908, at a profit of \$4,200, wherefore he prays for a judgment in a sum equal to one-half of said profit.

The present suit was filed January 28, 1913, and after due trial judgment was rendered in favor of defendant and the present appeal from said judgment was taken by plaintiff.

On the trial of the case, the act of sale of the property from plaintiff to defendant passed on February 28, 1904, being offered in evidence, defendant then objected to the admission of any parol testimony to show the alleged agreement, on the ground that such testimony tended to contradict and vary the written stipulations of said act.

The act of sale offered in evidence shows that it was passed before Fred. Deibel, notary public, on February 28, 1904, and purports to convey the whole property from plaintiff to defendant for a cash consideration of \$2,300, receipt whereof is acknowledged by plaintiff. It contains no other consideration, nor any stipulation outside of the ordinary warranty and subrogation clauses usually found in acts conveying immovable property. According to articles 2236 and 2276, Civil Code, the authentic act is full proof of the agreement contained in it, against the contracting parties, and parol evidence may not be admitted against or beyond what is contained therein, nor on what may have been said before or at the time of making the same. The rule of evidence thus announced by the Code is mandatory,

and the only exception thereto is where fraud or error is charged or where the act is vague and ambiguous and is not susceptible of intelligent construction without proof of extraneous facts. But, as none of these grounds which justify an exception to the rule are either pleaded or urged in the case, the parties must be strictly held to the principle thus prescribed by the Code. The situation then presented to the court by the pleadings and the act of sale of February 26, 1904, at the time defendant interposed his objection to the admissibility of parol evidence to prove the agreement, was that plaintiff had failed to allege any consideration for the obligation on defendant's part to turn over to him one-half of the profits made by defendant on the sale of the property executed on June 30, 1908, unless such consideration was based upon the sale of February 26, 1904; that the mere promise by defendant to give plaintiff one-half of said profits, if made without any consideration, would be a nudum pactum, unenforceable by an action at law; and that the authentic act of sale showed no such agreement or consideration for such an agreement. It therefore seems clear that the only purpose of such parol testimony was to prove a cause or consideration for said agreement, and in so doing to prove something beyond the said authentic act of sale, in contravention of the two cited articles of the Code. The evidence admitted over defendant's objection conclusively shows that such was plaintiff's purpose. Defendant's objection had the same effect as an exception of no cause of action would have had, if the act of sale had been annexed to plaintiff's petition. Thus viewing the legal situation of the parties, at the time defendant made his objection, we are of the opinion that said objection should have been maintained, and that, plaintiff then being unable to prove an enforceable or valid agreement, his suit should have been dismissed.

A case cited by defendant, and which in our opinion is exactly in point, is that of *Hart v. Clark's Executors*, 5 Mart. (O. S.) 614, wherein the court said:

"A verbal promise to pay to the vendor, the difference between the price at which a tract of land is purchased, and that at which it may be sold, cannot support an action."

For these reasons the judgment appealed from is affirmed.

O'NIELL, J., dissents, for the reasons stated in his dissenting opinion in *Robinson v. Britton*, published in 69 South. 284, particularly that the testimony was not offered to affect the title to real estate, nor to contradict the recitals of the deed, and because the rule excluding verbal testimony against a written instrument is subject to the exception that either party to a written contract may show by verbal testimony another cause or consideration than is stated in the instrument. See R. C. C. arts. 1896 to 1900.

(78 South. 978)

No. 23051.

STATE v. GILLIARD.

(May 27, 1918.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW §1151—CONTINUANCE—DISCRETION OF TRIAL COURT—INTERFERENCE.

Because trial judges have incomparably better opportunities than the Supreme Court to know when a continuance or postponement should be allowed, the Supreme Court is reluctant to interfere with their discretion in the matter.

2. CRIMINAL LAW §590(2)—CONTINUANCE—DISCRETION OF TRIAL COURT.

Where defendant, charged with homicide, delayed unnecessarily to employ counsel, but, when he did so, the latter investigated the circumstances and summoned a large number of witnesses, and defendant's charge of a conspiracy to implicate him through leaving a pair of his gloves at the scene of the homicide, made in support of his motion for continuance to permit of an investigation, was uncorroborated, and re-



hable evidence indicated that the gloves were left by defendant himself at the place where they were found, the trial court did not abuse his discretion in denying motion for continuance.

O'Niell, J., dissenting.

Appeal from Twelfth Judicial District Court, Parish of De Soto; John H. Boone, Judge.

Murray Gilliard was convicted of manslaughter, and he appeals. Affirmed.

C. E. Hardin, of Leesville, and S. M. Atkinson, of Mansfield, for appellant. A. V. Coco, Atty. Gen., and W. M. Lyles, Dist. Atty., of Leesville (Vernon A. Coco, of New Orleans, of counsel), for the State.

PROVOSTY, J. On an indictment for a murder alleged to have been committed on the 7th of the month, the accused was arraigned on the 15th, and the trial fixed for the 20th. He was then tried, and found guilty of manslaughter, and he has appealed.

He complains of the denial of the following motion for a continuance:

"Comes now Murray Gilliard, the defendant in the above-styled cause, and moves for a postponement of the trial of this case for the reasons as hereinafter set forth, to wit:

"(1) That he was indicted on the charge of murder on the 14th day of February, A. D. 1918, and on the same day he was arraigned on said charge, pleaded not guilty, and his trial was fixed for to-day, the 20th instant.

"(2) That prior to his indictment he had retained as his counsel, S. M. Atkinson, Esq., and had paid him a small retainer fee, but it was understood in said retainer agreement that the said counsel so retained was not expected to make any preparation for a trial, but was only to look after the preliminary arrangements in the event the defendant was indicted, and that the said S. M. Atkinson, Esq., made no investigation until after the arraignment and his fee had been fixed and secured.

"(3) That at the time of his arraignment he employed as his counsel C. F. Hardin, Esq., on whom he depended to carry the principal burden of the trial and to act as his leading attorney in this case.

"(4) That the said Hardin came to Mansfield on Sunday, the 17th instant, and made a visit to the scene of the alleged homicide with the view of ascertaining such facts as he was able to ascertain within a limited space of two

or three hours that he had to investigate the case.

"(5) That the said Hardin had depended upon the said Atkinson making a full and complete investigation prior to the time he arrived at Mansfield, and, the said Atkinson had made some investigation, but on account of having pressing matters on hand, and on account of his indisposition, the said Atkinson was unable to make such an investigation as the case warranted between the date of the arraignment and the 17th instant.

"(6) That the said Hardin was engaged in the case of *State of Louisiana v. S. C. McGarity*, pending in the district court for the parish of Bienville, and was forced to leave Mansfield on the afternoon of the 17th in order to be present in court at Arcadia on the 18th, and the said Hardin immediately returned from Arcadia on the evening of the 18th instant, and was busily engaged after that time in preparing the case of *State of Louisiana v. E. L. Harper*, which had been previously fixed for the 18th instant, but was carried over until the 19th.

"(7) That the case of *State of Louisiana v. E. L. Harper* was called on the 19th instant, but was continued, and said Hardin and the said Atkinson immediately made preparations to go and did go to Grand Cane, the scene of the alleged homicide, to make further investigation of the case.

"(8) Now your defendant would show that this charge against him is based entirely upon circumstantial evidence, and defendant's counsel have been unable to acquaint themselves with all of the circumstances which are alleged to be against your defendant and prepare to meet the same in the short time they have had to prepare this case.

"(9) That defendant is informed that the state expects to show that a pair of gloves, alleged to have belonged to your defendant, were found at or near the scene of the alleged homicide, and on this circumstance your defendant understands that the state is depending largely for a conviction.

"(10) That your defendant was not at the scene of the homicide at the time of said homicide, and did not commit the same; that he and his counsel have done all they could possibly do to ascertain facts which will clear up the circumstance depended upon by the state for a conviction, and that they had materially accomplished their purposes, save as to the alleged discovery of the gloves alleged to belong to defendant at or near the scene of the homicide, and allegation of which your defendant's counsel was informed the state intended to make only about 3 o'clock on the afternoon of the 19th instant; that immediately upon discovering the fact that the state intended to offer evidence to show that defendant's gloves were found at or near the scene of the alleged homicide, your defendant's counsel endeavored to ascertain why such charge was made, and was informed the state claimed that

as a matter of fact the said gloves were at said place and his said counsel immediately returned to Mansfield, interviewing him as to said gloves, and the fact that the state claimed that they were found at said place and your defendant then and there told his said counsel that he had not put said gloves at said place intentionally or unintentionally, was not there, but the first he knew of the charge concerning the gloves was when a deputy sheriff had just a few moments before his interview with his counsel showed a pair of gloves to defendant and asked him if such gloves were his own, which he admitted they were.

"(11) That your defendant is the victim of a conspiracy if his gloves were found at the scene of the homicide, and he immediately advised his counsel that there was a conspiracy put in motion by parties living in the neighborhood of said homicide who were seeking his conviction and gave his said counsel, the facts in his possession justifying such charge of conspiracy.

"(12) That due to the lateness of the hour of said interview which was about 5 o'clock the afternoon of the 19th, his said counsel was unable to investigate the conspiracy of which he was subject before the trial of this case, and that he believes, and on such belief here alleges, that if given a few days, say not more than three or four days, his counsel, with the assistance of his friends, will be able to demonstrate clearly the conspiracy against your defendant and the placing of the gloves at the scene of the homicide by parties other than himself for the purpose of fixing guilt upon your defendant.

"(13) That the parties who your defendant believes placed these gloves at the scene of the homicide to throw suspicion on him had access to said gloves and were highly prejudiced and hostile toward your defendant, but this cannot be proven, unless your defendant's counsel have an opportunity to make a thorough and searching investigation of all of the circumstances surrounding the said gloves and their alleged finding at or near the scene of the homicide, which investigation your defendant's counsel and friends would have done had they learned of said fact in time, but which could not have been done after they learned of the alleged finding of said gloves.

"(14) That the matter of the gloves hereinabove discussed is, as your defendant is informed, the main allegation relied upon by the state, which, if rebutted by proper, legal, sufficient, and admissible evidence that defendant can produce, if given a short delay, will insure defendant's acquittal and vindication, and defendant is entitled to a reasonable time within which to meet these charges, and his counsel make the necessary preparation.

"(15) That criminal court will be in session in Mansfield all of next week, and a petit jury has been summoned to serve for that week, and without any prejudice to the state your petitioner's case could be continued until one of

the early days of next week, which would afford him an opportunity to have his counsel fully investigate and determine all matters pertaining to his defense and insure him a fair trial.

"Wherefore premises considered, and the annexed affidavits considered, petitioner prays that a short postponement of this case be granted and for all orders and decrees necessary and for general relief."

For denying this motion the learned trial judge assigns the following reasons:

"The court overruled the motion for a postponement of the case for the reason that the court was personally aware of the fact that counsel had been employed in ample time, and had made ample preparation, had summoned a large number of additional witnesses, and were prepared to meet the simple issues which were to be and were presented on the trial.

"Mr. Atkinson was leading counsel, and he and client procured Mr. Hardin of Leesville to assist in the defense. Mr. Atkinson lives at Mansfield, and stated that he had made several trips to the scene of the homicide. He lived so near the scene that he had ample opportunity to make a thorough study of the facts, and he was thoroughly prepared to go to trial. Mr. Hardin went to Mansfield, as the district attorney states, on February 10th, and had ample time to devote to preparation for the trial of the case. The gloves referred to were mismatched gloves, no one could have been mistaken as to their identity. They were picked up a few feet from where deceased was shot, and accused did not deny, but stated, that they were his gloves. Accused could not deny that the gloves belonged to him—too many persons knew them. A reputable white man saw accused with the same gloves the evening before the homicide the next morning before good daylight."

The district attorney's statement is as follows:

"Mr. Atkinson and Mr. Hardin were employed by the defendant prior to the meeting of the grand jury. On February 10, 1918, Mr. Hardin told me that Mr. Atkinson and he had been employed to defend this defendant. He (C. F. Hardin) came to Mansfield on February 10th, solely for the purpose of looking after this case. Mr. Hardin was in Mansfield on Sunday, Monday, and Tuesday prior to the indictment of the defendant. Mr. Atkinson was not sick any during the week before, or the week of the trial. The court knows Mr. Atkinson was not sick any since court opened February 11, 1918."

[1, 2] Accused seems to have delayed unnecessarily to employ counsel; his statement of a conspiracy appears to be uncorroborated.

ed, although his counsel have made some investigation and summoned a large number of witnesses; reliable evidence indicates that the gloves were left by the accused himself at the place where they were found; trial judges have incomparably better opportunities than this court of knowing when a continuance or postponement should be allowed, hence this court has always been most reluctant to interfere with their discretion in the matter.

Judgment affirmed.

O'NIELL, J., dissents.

(79 South. 23)

No. 22735.

BERNHEIM v. PESSOU (two cases).

(Oct. 29, 1917. On the Merits, May 27, 1918.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR §393 — SUSPENSIVE AND DEVOLUTIVE APPEALS—SINGLE BOND.

All that is necessary to maintain an appeal is that a bond in the right amount be filed, and where both suspensive and devolutive appeals have been taken, the one bond will serve for the suspensive appeal, if filed in time; if not, for the devolutive appeal.

On the Merits.

2. EVIDENCE §418 — PAROL EVIDENCE AFFECTING WRITING—SALE OF REALTY.

A purchase of realty which appears by the written evidence of the sale to have been made by one person cannot be shown by parol to have been made in reality by or for another person, where the offer of the evidence is to affect the title to the realty, but the evidence is admissible where its purpose is simply to show the payment of a promissory note or the extinguishment of a money obligation by confusion.

3. BILLS AND NOTES §437 — MORTGAGE NOTE—RELEASE FROM OBLIGATION.

Where a mortgagee wrote the mortgagor that he had instituted executory proceedings against her to seize and sell the property formerly owned by her, but that he did not look to her personally for any part of the demand represented by the note, and that he released her from all personal obligation on account of the note, by the letter the mortgagor was released from all obligation on the note.

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4. MORTGAGES §309(1) — EXTINGUISHMENT OF MORTGAGE NOTE—EFFECT.

Where a mortgagor was released from all obligation on the mortgage note, the mortgage securing the note ceased to exist, since a mortgage is a mere secondary obligation, and a secondary obligation cannot exist in the absence of a primary obligation.

5. CHAMPERTY AND MAINTENANCE §6(2) — LITIGIOUS CHARACTER—TRANSFER FOR LOW PRICE.

Promissory notes are not rendered litigious by being transferred for a low price.

6. MORTGAGES §319(3) — AGREEMENT NOT TO SELL PROPERTY — SUFFICIENCY OF EVIDENCE.

In consolidated suits on a note and mortgage, evidence held to show that, even if a bank agreed with a defendant not to sell the property, it was merely a friendly promise, not intended to last more than a few months, nor to be binding further than the bank could carry it out without inconvenience to itself.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Consolidated suits by Jules Bernheim against A. O. Pessou, and against Mrs. C. N. Pessou, divorced wife of A. O. Pessou, wherein Inez Hoffman Spagnola intervened. From the judgment, plaintiff appeals. Motion was made to dismiss the appeal, and motion denied. Affirmed in part and set aside in part, and judgment ordered for plaintiff.

Borah, Himel, Bloch & Borah, of Franklin, for appellant. Walter L. Gleason, George Montgomery, and George B. Smart, all of New Orleans, for appellee Mrs. Inez Spagnola.

PROVOSTY, J. [1] Motion is made to dismiss the appeal in this case on the following grounds:

"First. That plaintiff and appellant, Jules Bernheim, seeks to recover a money judgment against intervener for over \$1,700, and from judgment dismissing his suit has taken a suspensive appeal on furnishing a bond of \$200.

"Second. That the lower judge allowed a suspensive appeal on furnishing a bond of \$200 and a devolutive appeal on furnishing a bond of \$200, but appellant has furnished only one bond for \$200 without designating which appeal he intends to perfect.

"Third. The bond for a suspensive appeal is

fixed by law and cannot be fixed by the judge allowing the appeal."

In support of this motion the argument is as follows:

"Appellant has not complied with the order of the court, but has furnished a bond according to his own fancy. The order, in accordance with the prayer of his petition of appeal, called for a separate bond for each appeal. He has failed to comply with this order, and the appeal should be dismissed in accordance with the rule in *Lochbaum v. Box, etc., Co.*, 120 La. 98 [44 South. 998], where the bond furnished was for less than the amount given in the order of court."

The reason why the appeal was dismissed in the case here cited was that the bond could not avail for a suspensive appeal because it had not been filed in time, and could not avail for a devolutive appeal because the amount had not been fixed by the judge. In the instant case the bond was filed in time, and hence can avail for the suspensive appeal; and it is in the amount fixed by the judge, and hence can avail for the devolutive appeal. All that is necessary to maintain an appeal is that a bond in the right amount be filed. Where both appeals have been asked, the one bond will serve for the suspensive appeal if filed in time; if not, then, for the devolutive. *Watkins v. Producers' Oil Co.*, 129 La. 484, 56 South. 338; *Brown v. Green*, 133 La. 725, 63 South. 303; *Cahn v. Baccich & De Montluzin*, 137 La. 4, 68 South. 193; *Funke v. McVay*, 21 La. Ann. 192; *State ex rel. Smith v. Judge*, 29 La. Ann. 833; *Schwan v. Schwan*, 52 La. Ann. 1186, 27 South. 678. The one bond being given for costs, and presumably sufficient for that purpose, there could be no use in giving a second bond to cover the same costs.

The motion to dismiss is denied.

#### On the Merits.

Mrs. Pessou executed a \$15,000 note, and secured it by mortgage on her property, a house and lot on St. Charles avenue in this

city. Thereafter she executed a note for \$11,000, and secured it by mortgage on the same property. The latter note her husband pledged to the Cosmopolitan Bank to secure a note of his own of \$9,000 held by said bank. These two notes the Cosmopolitan Bank delivered to the cashier of the Teutonia Bank, on receipt from this officer of \$9,000. Whether this was a payment for account of Pessou, operating an extinguishment of the \$9,000 note, or was a purchase of this note by the Teutonia Bank, is a question in the case; but unimportant, in view of our conclusions on other points.

The \$15,000 first mortgage was foreclosed, and at the foreclosure sale the Teutonia Bank became the purchaser. After satisfaction of the first mortgage and costs there remained a surplus of \$1,388.38 of the purchase price. This surplus was not paid to the sheriff, but was retained by the bank, purchaser at the sale, because of the second mortgage, securing the \$11,000 pledged note. The property passed to the bank free of this second mortgage, except to the extent of the amount thus retained.

The surplus belonged to Mrs. Pessou, owner of the mortgaged property; but she made then, and is making now, no claim for it; hence it must be considered to have gone towards satisfying to that extent the \$9,000 note secured by the pledge; and, as an effect of the bank's being at the same time holder of the pledged mortgaged note and owner of the mortgaged property, the mortgage was extinguished by confusion.

The present appeal involves two suits, consolidated, one via ordinaria against Pessou on the \$9,000 note and on another note, and one via executiva against Mrs. Pessou on the \$11,000 mortgage. Mrs. Spagnola, who by purchase from the Teutonia Bank is now owner of the property, has intervened in both suits, and has enjoined the executory process.

[2] The purchase by the bank at the foreclosure sale was not made in the bank's name, but in that of its president; and he on the next day transferred the property to the Delmar Realty Company. But this company was a mere holding company for the bank, and the president was in reality acting for the bank, so that the bank was the real purchaser and the real owner. On this point the evidence leaves no room for doubt; but it consists wholly of parol, and the learned counsel for plaintiff contend that a purchase of real estate which appears by the written evidence of the sale to have been made to one person cannot be shown by parol to have been made in reality by or for another person, and they cite the case of *Hoffmann v. Ackermann*, 110 La. 1070, 35 South. 293, and the decisions there cited. But that is true only where the offer of the evidence is for the purpose of affecting the title to the real estate. The rule then applies that title to real estate cannot be affected by parol. It is not true where the purpose of the evidence is simply to show the payment of a promissory note, or, as in this case, the extinguishment of a money obligation by confusion. In the instant case the title to the real estate remains entirely unaffected.

But if this evidence were excluded, and the mortgage were held not to have been extinguished by confusion, the plaintiff would be no better off, in view of the following letter addressed by plaintiff to Mrs. Pessou:

"New Orleans, La., May 12, 1914.

"Mrs. Carrie N. Pessou, City—Dear Madam: I have to-day instituted executory proceedings against you, the purpose of which is to cause to be seized and sold property formerly owned by you and which was mortgaged by you to secure a note of \$11,000.00, dated March 14, 1907, and secured by a mortgage passed before George Montgomery, notary public. Under the law it is necessary that the proceedings be brought against you, but my only purpose is to exercise my rights as a mortgage creditor against the property formerly owned by you and not look to you personally for any part of the demand represented by the note.

"The property has passed out of your hands by reason of a previous seizure, and in that sale the purchaser retained in his hands, to apply to the note upon which we are issuing execution, the amount that we are now claiming from the property. It is for this reason we are not looking to you personally for anything.

"I advise you of this order that it may give you no unnecessary concern or cause you to go to any unnecessary expense. For that reason I now say to you that, without in any manner waiving or novating the rights I have against the property, I release you from all personal obligation on account of said note.

"Yours truly."

[3, 4] It is very certain that by this letter Mrs. Pessou was released from all obligation on the \$11,000 note. If so, the mortgage securing this note ceased to exist, since a mortgage is a mere secondary obligation, and a secondary obligation cannot in the nature of things, exist in the absence of a primary.

Therefore this \$11,000 mortgage has ceased to exist, and the judgment of the lower court perpetuating the injunction of Mrs. Spagnola is correct.

The other note sued on is for \$2,500, and interest, and 10 per cent. attorney's fees. This note as well as the \$9,000 note, and the \$11,000 pledged note, and other notes, aggregating together some \$200,000, were purchased at the bankruptcy sale of the Teutonia Bank for some \$300, and were by the purchaser of them transferred to plaintiff.

[5] Pessou contends that this was the purchase of a litigious right; but (except for the agreement hereinafter to be mentioned) he does not pretend that these notes did not represent good, valid, and unquestioned obligations in the hands of the bank, and certainly promissory notes are not rendered litigious by being transferred for a low price. The record does not show why this mass of notes sold for so little. We assume it was because the obligors on them were considered to be pecuniarily irresponsible.

[6] Some eight months after the acquisition of the property at the foreclosure sale

the Teutonia Bank sold it. Pessou contends that this was in violation of an agreement he had with the bank, and that by this violation of agreement he was liberated from the \$9,000 debt. This pretended agreement is the one we alluded to awhile ago. It is not sought to be proved otherwise than by Pessou's uncorroborated testimony, and is said to have been to the effect that the bank would hold the property until Pessou could find a purchaser for it at a price sufficient to cover the amount the bank was out of pocket in connection with it together with this \$9,000 debt; Pessou to pay interest on this \$9,000 debt in the meantime.

This pretended agreement was not mentioned in the pleadings; and objection was made to any evidence being received in proof of it. It is inconsistent with the conduct of the bank in selling the property, and also with the conduct of Pessou himself, who admits that he made no demand for the carrying out of it. He says that the matter was "discussed," but that the sale "was a matter of necessity with the bank, and I had no say so in the matter." We conclude that, even if any agreement of that kind ever existed, and even if provable under the pleadings, it was simply a friendly promise not intended to last more than a few months, nor to be binding further than the bank could carry it out without inconvenience to itself.

Pessou has made no appearance in this court. On what ground judgment was rendered in his favor rejecting plaintiff's demands as to him we are not informed.

The judgment appealed from is therefore affirmed in so far as it perpetuates the injunction and dismisses plaintiff's foreclosure proceeding against Mrs. Pessou, and condemns plaintiff to pay the costs of suit No. 108601 of the docket of the trial court, and is set aside in so far as it dismisses plaintiff's suit against Pessou. And it is now ordered, adjudged, and decreed that the plain-

tiff, Jules Bernheim, have judgment against the defendant, Alphonse O. Pessou, in the sum of \$9,000, with 7 per cent. per annum interest thereon from January 31, 1912. less \$1,388.38, to be credited as of said date, and in the further sum of \$2,500, with 8 per cent. per annum interest thereon from 27th day of March, 1912, plus 10 per cent. on this \$2,500 and interest, and for the costs of suit No. 107815 of the docket of the trial court, and for one half of the costs of this appeal, and that plaintiff pay the other half of the costs of this appeal.

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(79 South. 26)

No. 21587.

MASON v. NEW ORLEANS TERMINAL  
CO.

(May 27, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §185(2)—"FELLOW SERVANT"—CAR CARPENTER AND CAR REPAIRER.

A car carpenter and a car repairer, neither of whom has any authority or supervision over the other, both of whom are employed by the same master on the same car, are fellow servants, where, in the course of their respective duties, they necessarily come into contact with each other, and the work of each depends in certain instances on the work of the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fellow Servant.]

2. CONSTITUTIONAL LAW §245 — MASTER AND SERVANT §11 — EQUAL PROTECTION OF THE LAWS—DEFENSES IN SUIT FOR PERSONAL INJURY.

Act No. 187 of 1912, p. 333, "in reference to defenses in suits for damages for personal injury," is violative of the Constitution of the state of Louisiana and the Constitution of the United States, in that it denies to certain persons the equal protection of the laws.

(Additional Syllabus by Editorial Staff.)

3. STATUTES §117(2)—SUBJECT AND TITLE.

Act No. 187 of 1912, entitled "An act in reference to defenses in suits for damages for personal injury," not referring to public serv-

ice corporations, although such corporations only are dealt with in the act, does not express the object of the act.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by George Mason against the New Orleans Terminal Company. Judgment for plaintiff for \$500, and defendant appeals. Judgment reversed, and judgment rendered in favor of defendant dismissing plaintiff's suit.

Dufour & Dufour and R. B. Logan, all of New Orleans (George Janvier and Hall, Monroe & Lemann, all of New Orleans, of counsel), for appellant. N. E. Humphrey and G. E. Williams, both of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff alleges that while repairing a broken or defective brake beam attached to a box car on the tracks of the defendant company that a piece of timber measuring 2"x4" by about 8' in length fell from the top of said box car, striking him on the head, severely injuring him. He further alleges that the falling of said piece of timber was caused by the gross carelessness, negligence, and want of skill of another employé of said company, who was at the time working on the top of the car doing some carpentering necessary in the repairing of said car.

The employé who caused the injury was known as a car carpenter, and the injured employé was called a car repairer. Plaintiff sues defendant for damages.

Defendant answered, admitting all the material facts alleged in the petition, including the negligence and carelessness of the car carpenter, and made the special defense that Act 187 of 1912, which attempts to abolish the fellow-servant doctrine as a defense in personal injury suits, was unconstitutional. It further alleged that the two employés were fellow servants, and that the injured employé could not recover for the injury suffered by

him and caused through the negligence of a fellow servant.

There was judgment in favor of plaintiff in the sum of \$500, and defendant has appealed.

The appellant assigns as errors:

(1) That the trial judge erred in not holding that Act 187 of the General Assembly of Louisiana for the year 1912 is unconstitutional, both under the Constitution of Louisiana and of the United States.

(2) That the trial court erred in not holding that Mason, the plaintiff, and Hoffman, the employé who injured him, were fellow servants.

[1] It is argued on behalf of plaintiff, and he introduced three witnesses to support his argument, that the car carpenter and the car repairer were not fellow servants.

It appeared from the evidence that the freight car undergoing repairs was in need of general repairs to both woodwork and ironwork, and the workmen referred to were engaged at the same time on the car under a common master, and that they were actually repairing the disabled car. The car repairer and the car carpenter may not have had exactly the same duties to perform, as one was working in iron and the other was working in wood; but they came into contact with each other during the course of their employment, and it would seem that they were fellow servants.

In the case of *Day v. La. Western Ry. Co.*, 121 La. 180, 46 South. 203, the court held that an engineer and a switchman were fellow servants, because in the carrying out of their respective duties they were necessarily brought into contact with each other. In the case of *Bell v. Lbr. Co.*, 107 La. 725, 31 South. 994, an engineer and a brakeman were held to be fellow servants because they were employed by the same master and engaged in handling the same train. In the case of *Blankenship v. Edgewood Land & Logging*

Co., 142 La. 524, 77 South. 130, it was held that a tongs setter and the boom man in the employ of a logging company were fellow servants. In *Weaver v. Goulden Logging Co.*, 116 La. 468, 40 South. 798, the court held that the man who operated the steam drum was a fellow servant of the tongs setter. And in *Jackson v. Cousins*, 141 La. 449, 75 South. 111, the tongsman and the man who signaled the man at the drum to draw the cable were held to be fellow servants.

It is essential that fellow servants be engaged in the same work under the same master and that their work, to a certain extent, bring them into contact with each other. The requirement that they be engaged in the same work does not mean that both must be doing exactly the same thing at the same time. If they are engaged on the same general work, and in the course of their work come into contact with each other, or that each knows of the presence of the other and knows of the work that the other is doing, that is all that is required.

The testimony is to the effect that the car repairer and the car carpenter on some railroads are one and the same person, doing all of the work in both wood and iron.

The car carpenter and the car repairer in this case were in the actual presence of each other working on the same car, and knew of the presence of one another, and they knew what the other one was doing. They were fellow servants.

[2, 3] Act No. 187, 1912, p. 333, which is attacked as being unconstitutional, reads as follows:

"An act in reference to defenses in suits for damages for personal injury.

"Be it enacted by the General Assembly of the state of Louisiana, that assumption of risks by an employé, or the negligence of a fellow servant shall not be a defense to an action for damages for personal injuries, but may be considered by the court in determining the measure of damages. Provided, the provisions of this act shall apply only to public service corporations."

Defendant attacks the title as not expressing the object of the act. The title is very meager. Public service corporations are in no manner referred to in the title, although public service corporations only are dealt with in the act. The title can hardly be said to express the object of the act.

The other objection to the act is even more serious. It contains a discrimination against public service corporations in favor of non-public service corporations and individuals; and it therefore denies to public service corporations the equal protection of the laws.

The discrimination in the act is unreasonable, unfounded, and arbitrary between public service corporations and other corporations and individuals. There is no reason that suggests itself to the mind why the two defenses mentioned in the act should be denied to public service corporations when the law permits them to be urged by other corporations and by individuals who may be engaged in "public service," or in the same business. The case is not limited to this service or to the employés whose particular duties or occupations are so dangerous as to possibly require protection. As it is written, the act includes within its terms the clerk, the bookkeeper, etc., as well as the man in charge of a train of cars. There is an extra hazard attached to the occupation of the trainman, and this extra hazard may be covered or protected by proper legislation; but such extra hazard is not attached to the occupation of the clerks, bookkeepers, etc., who may be employed by a railroad company. The distinction appears to have been made by the court in the case of *Mo. Pac. Ry. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, in discussing a statute with respect to railroad corporations which had for its object the protection of their employés as well as the safety of the public. The danger which always hovers over railroad employés cannot truly be said to attach to all persons employed by



public service corporations irrespective of the character of the employment or of the nature of the business at hand.

The Legislature may classify persons engaged in hazardous businesses in order to impose upon them liability for injuries to their employes incident to said business; but in such case the liability of such persons engaged in the hazardous business must be made to depend upon the character of the employment, and not the character of the employer.

The work in which Mason was engaged was not extrahazardous. He was not injured in the operation of a railroad. The work he was doing was no more hazardous because his employer was a railroad company than it would have been had his employer been an individual, or a corporation other than a railroad company.

Persons may be engaged in the employ of public service corporations without being engaged in extrahazardous undertakings; the mere fact that a corporation is engaged in the service of the public does not render protective legislation necessary.

Many public service corporations are engaged in hazardous undertakings, and if any one of the individual classes of such corporations is covered by one act and the defense is abolished as to all without regard to the particular purpose and occupations of each, then the act is unconstitutional, because the discrimination is unwarranted and is not founded upon a real distinction.

Such a distinction was recognized by the court in the case of *State v. Weinstein*, 141 La. 1085, 76 South. 208, L. R. A. 1917F, 706, where Act No. 250 of 1916, p. 523, a criminal statute, was under investigation. It was therein made a crime for one to purchase or receive for sale or in pledge, or on storage or for safe-keeping, any article of iron, brass, or other metal belonging to a railroad com-

pany, and which was manufactured exclusively for railroad purposes, without the consent of the officers of the railroad company. It was therein held that the act was not class legislation, and that the Legislature simply exercised the police power of the state in passing, in the general interest of the public and for its safety, as well as to discourage the pilfering of such articles from a public service corporation, the act in question. It was presumed that the Legislature had knowledge of the railroad business and how it was conducted, and the everyday practical operation of railroads, and that brass journals, etc., were the objects of frequent thefts. As railroad cars cannot be operated without these appliances, and there is no practical method of preventing their exposure to theft, and as they are easily stolen from trains, resulting in derailments, with consequent injuries to persons and loss of property, the Legislature made special provisions for the punishment of the crime of selling and buying journals, etc., stolen from railroads.

Act No. 187, 1912, p. 333, is unconstitutional because it includes in one class all employes, those engaged in nonhazardous occupations as well as those engaged in hazardous occupations by certain corporations; and for the further reason that it denies to public service corporations, and in favor of individuals, the equal protection of the laws, and it denies to public service corporations, and in favor of all other corporations which may be doing identically the same work, the equal protection of the laws.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be judgment in favor of defendant, dismissing plaintiff's suit at his cost.

MONROE, C. J., takes no part. O'NIELL, J., concurs in the decree.

(79 South. 78)

No. 22587.

**BILLIOT v. TERREBONNE PARISH  
SCHOOL BOARD et al.**(April 29, 1918. On Application for Rehearing,  
May 27, 1918. Rehearing Denied  
June 29, 1918.)*(Syllabus by the Court.)***COURTS — 224(9)—JURISDICTION—LOUISIANA  
SUPREME COURT—AMOUNT.**

A mandamus suit by a parent to compel a school board to admit his children to a public school, the matter in dispute being only a civil or political right, is not within the jurisdiction of the Supreme Court, if the right in contest does not exceed \$2,000 in value.

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; William E. Howell, Judge.

Mandamus by Henry L. Billiot against the Terrebonne Parish School Board and others. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

Harris Gagne, of Houma, and Beattie & Beattie, of Thibodaux, for appellant. J. A. O. Colgnet, of Thibodaux, and Foster, Milling, Saal & Milling, of Franklin, for appellees.

O'NIELL, J. This is a mandamus proceeding to compel the school board to admit the plaintiff's children to a public school for white children. The defense is that the plaintiff's children are of the colored race. His demand was rejected, and he prosecutes this appeal. The defendants have moved to dismiss the appeal for want of jurisdiction.

The only matter in dispute, or object of the suit, is the civil or political right claimed for the children to attend the public school. This court has not jurisdiction in such case, if the right claimed and contested does not exceed \$2,000 in value. See *Oberly v. Calcasieu Parish School Board*, 142 La. 788, 77 South. 600.

The plaintiff alleged in his petition that the defendants' refusal to admit his children

to a school for white children was a slander of him and the children, and had damaged them to an extent exceeding \$2,000. He reserved his right to sue for damages for the alleged slander. The injury suffered in that respect, therefore, is not involved in this suit, and has nothing to do with the value of the matter or right in contest.

The three children for whose benefit this suit is prosecuted are, respectively, 8, 10, and 12 years of age, and have therefore an average term of 8 years to attend a public school. We cannot assume that their tuition would cost \$2,000; that is, approximately, \$10 a month for each child. Manifestly, however, the right demanded has a pecuniary value, the amount of which may be shown by affidavit. The appellant has filed a motion to have the case transferred to the Court of Appeal, in the event of our finding that we have not jurisdiction. Our conclusion is that we have not jurisdiction of the suit, and that it should be transferred to the Court of Appeal.

It is ordered that this case be transferred to the Court of Appeal for the First Circuit. The appellant is to pay the cost of appeal to this court, all other costs to depend upon the final judgment.

LEOHE, J., concurs in the decree.

On Application for Rehearing.

PER CURIAM. In this case, it is ordered that the decree heretofore handed down be in so far amended as that it is now ordered that the appeal herein be dismissed, instead of being transferred to the Court of Appeal, the right being reserved to the plaintiff to apply for a rehearing, with respect to the amendment so ordered, within the usual delay.

O'NIELL, J., dissents from the amendment of the decree.

(79 South. 79)

No. 22314.

**MADDUX v. MADDUX.**

(May 27, 1918. Rehearing Denied June 29, 1918.)

*(Syllabus by Editorial Staff.)***DIVORCE — 124 — SEPARATION FROM BED AND BOARD — JURISDICTION — DOMICILE.**

In a wife's suit for separation, evidence held to sustain a judgment dismissing the suit for want of jurisdiction in the civil district court, in that defendant's domicile was in another parish.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Suit by Marie Josephine Maddux against N. Watts Maddux for separation from bed and board. Judgment for defendant dismissing the suit, and plaintiff appeals. Affirmed.

L. Fred Andry, of New Orleans (Clifford E. Hays, of New Orleans, of counsel), for appellant. Lyle Saxon, of New Orleans, for appellee.

O'NIELL, J. The plaintiff appeals from a judgment dismissing her suit for separation from bed and board. A plea to the jurisdiction of the civil district court for the parish of Orleans was maintained, on the ground that the defendant's domicile was in the parish of St. Martin.

The case presents only the question of fact whether the defendant, whose matrimonial domicile was in the city of New Orleans, and who moved to the parish of St. Martin seven months before this suit was filed, had the intention of residing there permanently. He testified that he had that intention, and his testimony was corroborated by two witnesses who swore that he had established his residence in the parish of St. Martin, and that his business required his remaining there. There is no evidence in the record to justify a reversal of the judgment appealed from.

The judgment is affirmed.

(79 South. 80)

No. 23084.

**WUNDERLICH et al. v. NEW ORLEANS RY. & LIGHT CO. et al.**

(May 27, 1918. Rehearing Denied June 29, 1918.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR — 71(3) — FINAL JUDGMENT — INJUNCTION.**

Where the entire relief sought is an injunction, and the writ is denied, after a hearing on a rule nisi, the judgment will be regarded as final and appealable.

**2. APPEAL AND ERROR — 714(1) — EX PARTE ALLEGATIONS IN SUPREME COURT — CONSIDERATION.**

Ex parte allegations contained in pleadings filed in this court, as to facts aliunde the transcript, cannot be considered by this court.

**3. COURTS — 224(9) — APPELLATE JURISDICTION — AMOUNT — LOUISIANA SUPREME COURT.**

Where the appellate jurisdiction of this court depends upon the amount involved, the question of amount will be determined by the circumstances disclosed by the record, rather than by the allegations of the litigants.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Suit by Edward Wunderlich and others against the New Orleans Railway & Light Company and the Commissioner of Public Utilities of New Orleans. From an order dismissing a rule nisi requiring defendants to show cause why they should not be enjoined from changing the routing of certain street cars, plaintiffs appeal. Appeal dismissed.

Titche & Rogers and Victor K. Klam, all of New Orleans, for appellants. Farrar, Goldberg & Dufour, of New Orleans, for appellee New Orleans Ry. & Light Co. I. D. Moore, City Atty., and John F. C. Waldo, Asst. City Atty., both of New Orleans, for appellee City of New Orleans.

MONROE, C. J. This is an appeal from a judgment dismissing a rule nisi, requiring the railway and light company (hereafter called the company) and the commissioner of public

utilities of New Orleans to show cause why they should not be enjoined from changing the routing of certain of the street cars. Plaintiffs, of whom there are seven individuals and business corporations, appear as citizens and taxpayers, and complain that change has been made without legal authority, in disregard of the contract between the city and the company, and in violation of the Constitutions of the state and the United States, and they pray for an injunction, prohibitory and mandatory, restraining the parties named from changing or destroying the contract in question, restraining the company from operating the Peters avenue cars down Dryades street from Julia, as it is now doing, and commanding it to operate them as heretofore and in accordance with its franchise, from Dryades and Julia streets, out Julia to St. Charles, down St. Charles to Canal, out Canal to the river front, and back, on Canal street to Carondelet, and further commanding it to remove the switch, put in by it at Canal and Carondelet streets, and restore the Canal street pavement to its former condition.

The commissioner and the company move to dismiss the appeal, on the grounds that this court is without jurisdiction *ratione materiæ*, for this, to wit: That no ordinance has been declared unconstitutional, and the amount in dispute, and the interests of each of the plaintiffs, does not exceed \$2,000; that plaintiffs have taken an appeal to the Court of Appeal, thereby abandoning this appeal; that the appeal herein is from an interlocutory order which works no irreparable injury.

Considering the grounds thus stated, in inverse order as compared with the statement:

[1] 1. We find that, practically, the whole case was tried on the rule nisi, and the weight of the jurisprudence is to the effect

that, where the entire relief sought is an injunction, and the writ is denied, after a hearing on rule nisi, the judgment must be regarded as final and appealable. *Beebe v. Guinault*, 29 La. Ann. 795; *State ex rel. Becker v. Judge*, 31 La. Ann. 850; *State ex rel. Behan v. Judge*, 32 La. Ann. 1276; *Murphy v. Police Jury*, 117 La. 355, 41 South. 647; *Manion v. Board*, 119 La. 879, 44 South. 515.

[2] 2. We have no other advice concerning the appeal to the Court of Appeal than the *ex parte* statement contained in the motion to dismiss, and do not feel at liberty to go outside of the transcript and take facts from the pleadings in this court.

[3] 3. It has frequently been held by this court that, where the appellate jurisdiction depends upon the amount involved, the question of amount will be determined by the circumstances disclosed by the records, rather than by the allegations of the litigants, and especially where there is no demand for a moneyed judgment. *Wilkins v. Gantt*, 32 La. Ann. 929; *State ex rel. Police Jury v. Miscar*, 34 La. Ann. 834; *Buddig v. Baldwin*, 38 La. Ann. 394; *Pinckney v. Wolf*, 41 La. Ann. 306;<sup>1</sup> *Johnson v. Hosmer*, 108 La. 697, 32 South. 961; *Leury v. Baton Rouge C. Co.*, 117 La. 955, 42 South. 439; *Schlemmer v. Howard*, 120 La. 322, 45 South. 263; *Nick v. Bensberg*, 123 La. 351, 48 South. 986; *Wels v. Board of Trade*, 125 La. 1010, 52 South. 130; *Bloomfield v. Thompson*, 133 La. 211, 62 South. 634.

In the instant case, plaintiffs pray for no moneyed judgment, and, although they allege that they are each interested to an extent exceeding \$2,000, that allegation is not sustained by proof, nor do we think it susceptible of proof.

It is therefore ordered that this appeal be dismissed.

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<sup>1</sup> 6 South. 27.

(79 South. 170)

No. 21329.

NELSON v. J. B. HONOR CO., Limited.

(May 27, 1918. Rehearing Denied June 29, 1918.)

*(Syllabus by the Court.)*

## 1. QUESTIONS OF FACT.

Only questions of fact are presented in this case.

*(Additional Syllabus by Editorial Staff.)*

## 2. MASTER AND SERVANT §281(9)—INJURY TO EMPLOYÉ OF STEVEDORE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action by a longshoreman against his employer, a stevedore company, for injury when a hatch cover fell into the hold, evidence held to show his negligence in assuming a dangerous position in disobedience to the orders of his superiors.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Jesse Nelson against the J. B. Honor Company, Limited. Judgment for defendant dismissing the case, and plaintiff appeals. Affirmed.

Paul W. Maloney and Frank B. Davenport, both of New Orleans, for appellant. J. C. Henriques, of New Orleans, for appellee.

SOMMERVILLE, J. The plaintiff was a longshoreman in the employ of the defendant stevedore company, and was engaged in loading piles on a vessel in the Mississippi river.

The hatches, covers, burden pieces, sister pieces, and fore and after pieces of the vessel were all taken off of hatch No. 4, for the purpose of loading it with piles. Hatch No. 2 had only one section taken off. The workmen were lowering the piles into No. 4 hatch, and after the end of the pile was in the hold of the ship, they would take the fall that was attached to No. 3 winch and pull the pile forward so as to get it landed in the hold of the ship. After the ship had been partially loaded, and while a very long pile was being loaded, it became jammed; and the order was given by the foreman for all hands to

come out of the hold of the ship and remove the hatch cover from hatch No. 3. There were four hands in the hold of the ship at the time. Two of them went on deck in accordance with the order given, while two others, one of whom was plaintiff, remained in the hold. The hatch cover fell in and injured plaintiff in the manner set forth in his petition. He herein sues defendant for damages.

The defendant answered and alleged that plaintiff was injured through his own gross fault and negligence, and through disobedience of the order of his superiors.

There was judgment in favor of defendant, and plaintiff has appealed.

There were four witnesses for plaintiff, including himself, and four witnesses for the defendant, who witnessed the accident. Witnesses for plaintiff and defendant contradict each other as to the manner in which the accident occurred, and as to the order given by the foreman for all hands to come on deck. Plaintiff's witnesses say that the order was for two of the workmen to come up, and for the other two to remain in the hold; while defendant's witnesses all testify that the order was given for all the hands to come on deck to remove the hatch.

The trial judge who saw and heard all of the witnesses was impressed with the truth of the testimony given by the defendant's witnesses, and dismissed the case. We see no reason for disturbing his finding. The case presents only a question of fact, and the finding of the lower court will not be disturbed, as it appears to be correct, after an examination of the evidence.

Plaintiff, in the course of his testimony, admitted that he knew the hatch was to be removed and that it was dangerous to stand under it at that time. When he took the dangerous position he assumed, and disobeyed the orders of his superiors to move from under the hatch and to go on deck, he was gross-

ly negligent; and he cannot recover for the injuries he suffered. He was told by one of his fellow workmen to get out of the way and to go back out of danger in the event that anything should fall. This fellow servant took a safe position, but plaintiff answered, "I'm all right."

The derrickman for No. 3 hatch testified that he called all the men up out of the hold; that he hooked on the fore and after piece to the fall and began to take off hatch No. 4; that he swung the fore and after piece over to the men to land it on the other section of the hatches, but they missed catching it, and it swung back and struck the burden piece and knocked the other sections of the hatch off, which fell into the hold and hurt the plaintiff. But plaintiff knew that it was dangerous to be under the hatch at the time, and he was twice warned to get from under it.

It was distinctly testified that there was no other work being done on the vessel at the time, although plaintiff says he was then loading the vessel. He should have been on deck helping to remove the hatch.

The judgment appealed from is affirmed at the cost of plaintiff.

O'NIELL, J., concurs in the decree.

(79 South. 171)

No. 21713.

MARTIN v. FIRST NAT. FIRE INS. CO.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

INSURANCE — §376(1) — FIRE INSURANCE — WAIVER OF PROVISIONS — KNOWLEDGE OF AGENT.

The stipulation in a policy of insurance that no waiver of any of the provisions of the policy shall have effect unless written upon or attached to the policy is a legal and binding contract. And the insured cannot claim waiver or estoppel based upon the knowledge of the agent of the insurance company that the policy is being violated.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Mrs. Francis Martin against the First National Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Annulled, and judgment rendered for defendant dismissing the suit.

Howe, Fenner, Spencer & Cocke, of New Orleans, for appellant. Titcher & Rogers, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff sues upon two insurance policies because of the loss by fire of property insured resulting from the explosion of a gasoline stove which was in use by a tenant of plaintiff in the property at the time of the fire.

Defendant answered that the policies were avoided and annulled because of the use of gasoline on the premises contrary to a prohibition contained in the policies.

Thereupon plaintiff pleaded an estoppel against defendant based on the allegation:

"That the gasoline stove complained about in the answer was present in the said premises at the time the insurance was written to the knowledge of the said inspectors, and to the knowledge of the defendant insurance company; that, notwithstanding that the said insurance companies and their inspectors and agents were aware of the presence of the gasoline stove, they wrote the policy of insurance, accepted the premiums, maintained the insurance contracts in force, and retained the said premiums."

The plea of estoppel was maintained, and judgment was rendered in favor of plaintiff. Defendant has appealed.

Plaintiff relies entirely upon the plea of estoppel filed by her. She says that the inspector inspected the premises before the policies were issued, and that he saw, or should have seen, the gasoline stove at that time in the kitchen of the building. The inspector, testifying, says that he had no recollection whatever of having seen a gasoline stove on the premises.

The doctrine of waiver, as asserted

against insurance companies to avoid the strict enforcement of the terms contained in their policies, is only another name for the doctrine of estoppel. It can be invoked where the conduct of the companies has been such as to induce action and reliance upon it, and where it would operate as a fraud on the insured if they were afterwards allowed to disavow their contracts and enforce their conditions. *Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387.

The policies sued upon contain the contracts between the parties, and they are the law unto them, and the court can only enforce the law as stipulated and agreed upon. It is therein agreed that:

"No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon, or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privileges or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

There was no written permission written or attached to the policy permitting the use of gasoline on the premises. On the contrary, the policy stipulated that gasoline should not be used on the premises.

Under the letter of the law between the parties there was no waiver of the provision with reference to the use of gasoline, and plaintiff herself is estopped from claiming loss under the policies.

Plaintiff relies upon several decisions in other jurisdictions and the case of *Mongeau v. Liverpool, London & Globe Insurance Co.*, 128 La. 654, 55 South. 6. The latter was a

case for the loss of premises occupied by a pressing club. But the evidence therein was so conflicting that it was impossible for the company to sustain the defense that benzine, or other inflammable articles, had been used on the premises; and there was judgment in favor of plaintiff in that case. Discussing the rule, if the hazard be increased by and with the knowledge and consent of the insured that he might lose the benefit of the policy, it is said by the court that the plaintiff was lulled into a feeling of security on assurance by the defendant that the pressing club was not an extrahazardous enterprise. But it does not therein hold that an insurance company would be estopped from showing that the terms of a policy had been violated by the use of prohibited articles in the insured premises.

If the inspector of defendant insurance company failed to see the gasoline stove on the premises of plaintiff, or if, seeing it, he orally consented to the use thereof, such overlooking or oral consent cannot operate against the requirement of the policy that waiver should be indorsed on or attached to the policy. *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 South. 143; *People's Bank v. Ins. Co.*, 130 La. 951, 58 South. 826.

No good reason or decision of this court authorizes the court to hold the above-quoted covenant or stipulation between the parties to be void. It is a plain, explicit stipulation; and it is as binding upon the insured as any stipulation of the policy. It was not waived.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be judgment in favor of defendant dismissing plaintiff's suit at her cost.

(79 South. 172)

No. 21429.

FORD v. SHAFFER et al.

(April 29, 1918. Rehearing Denied June 29, 1918.)

*(Syllabus by the Court.)*BROKERS ~~§~~ 56(3) — RIGHT TO COMMISSION — SERVICES.

The conditions of a brokerage contract being that the owner of the property is to pay a stipulated commission if the broker effects a sale or procures a purchaser at a stated price, the broker is not entitled to the commission if the owner sells the property without the broker's aid, long after the broker has tried and failed to effect a sale, even though the sale was made to one whom the broker introduced, but failed to interest, as a prospective purchaser.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by Julius C. Ford against Mrs. Mary A. Shaffer and another. Judgment for plaintiff, and defendants appeal. Judgment annulled, and plaintiff's demand rejected. Price & Price, of Ruston, Joseph A. Loret,

Caffery, Quintero & Brumby, of Franklin, and T. Jones Cross, of Baton Rouge, for appellants. Taylor & Porter, of Baton Rouge, of Baton Rouge, and Miller, Miller & Fletcher, of New Orleans, for appellee.

O'NIELL, J. The defendant appeals from a judgment condemning her to pay the plaintiff a broker's commission for the sale of her plantation.

She agreed to pay the commission if the plaintiff should bring about a sale, or procure a purchaser, at \$40 an acre for the land, including the cattle on the place.

The plaintiff visited the plantation with a prospective purchaser, a Mr. Fabacher, and introduced him to the defendant; but the public road leading to the place was then in very bad condition, the automobile bogged, the men had to get out and walk, and Mr.

Fabacher was so disgusted when he arrived at the place that he refused to look over the property or to consider a proposition of sale at any price. The negotiations between him and the plaintiff were then at an end, except that the plaintiff thereafter tried unsuccessfully to interest him in the defendant's plantation or in any other of the places that the plaintiff, as a real estate agent, had for sale.

More than ten months after the visit of the plaintiff and his prospective customer, the defendant's husband undertook to sell the place, and, without the plaintiff's aid or knowledge, sold it to Mr. Fabacher. In the meantime, the police jury had made arrangements to gravel the public roads of the parish, and it was the assurance that that improvement would be made in the vicinity that caused Mr. Fabacher to consider the matter of buying the plantation. He paid \$37.50 an acre for the place, without the cattle. The defendant sold the cattle afterward at a price that made the total more than the land would have brought at \$40 an acre.

We are convinced from the evidence—particularly the testimony of Mr. Fabacher—that the plaintiff's undertaking to sell the property was a failure; that it was the assurance that there would be a model road leading to the place that brought about the sale; and that the plaintiff did not aid at all in the transaction.

The theory of the plaintiff's suit seems to be that he had a vested interest in any sale that might be made to the man whom he introduced as a prospective purchaser. The doctrine which this court has recognized to the contrary is that a broker who has failed in an attempt to effect a sale is not entitled to a broker's commission on a sale made afterwards by the principal to the person to whom the broker tried and failed to sell the property. *Lewis v. Manson*, 132 La. 817, 61 South. 835; *Hauch v. Bonnabel*, 134 La. 847, 64 South. 795. Our conclusion is that the



plaintiff is not entitled to a broker's commission.

The judgment appealed from is annulled and the plaintiff's demand is rejected at his cost.

(79 South. 173)

No. 22734.

ATCHAFALAYA LAND CO., Limited, v.  
GRACE, Register, et al.

(June 29, 1918.)

*(Syllabus by the Court.)*

PUBLIC LANDS 61(12)—PURCHASER FROM  
COMMISSIONERS OF LEVEE DISTRICT—SALE—  
INJUNCTION.

A purchaser from the board of commissioners of the Atchafalaya Basin levee district of land donated to it by Act No. 97 of 1890, has a standing in court to protect his title, by staying a sale of such land by the register of the land office to a third person under the supposed authority of Act No. 215 of 1908, though the act of conveyance of the land from the state to the board may not have been executed.

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Suit for an injunction by the Atchafalaya Land Company, Limited, against Fred J. Grace, Register, and Wade O. Martin, Sheriff, of St. Martin Parish. From a judgment perpetuating an injunction, defendants appeal. Affirmed.

A. V. Coco, Atty. Gen., and Harry Gamble, Asst. Atty. Gen., for appellants. Burke & Smith and F. E. Delahoussaye, all of New Iberia, for appellee.

MONROE, C. J. Defendants prosecute this appeal from a judgment perpetuating an injunction restraining them from selling, under the supposed authority of Act No. 215 of 1908, a certain 40-acre tract of land, described as S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of Sec. 7, T. 13 S., R. 12 E., to which plaintiff sets up title as having been acquired, through mesne conveyances from the board of commission-

ers of the Atchafalaya Basin levee district, to which it was donated by Act No. 97 of 1890. The contention on behalf of defendants is that, pursuant to the donation declared by the act of 1890, though the board of commissioners might demand a title to the tract in question, and though, for a valuable consideration, the board, by two acts, respectively, promised to convey, and did convey, the tract in question to plaintiff's author, yet that plaintiff cannot exercise that right, because by Act No. 215 of 1908 the General Assembly declared all applications for entry or purchase of public lands of the state, then on file, to be null, and prescribed a particular method whereby they should thereafter be sold. This court has, several times, had occasion to consider the effect of the grants contained in Act No. 97 of 1890, and similar statutes, and of Act No. 215 of 1908, when construed therewith, and has held the statute last mentioned to be inapplicable to claims for lands granted under those first mentioned, or under contracts with the grantees; that, in effect, the state had parted with the lands donated to the levee boards; that they were not thereafter open to entry as "public lands of the state," and that, having been subjected to the disposition of the levee boards, the contracts made by those boards with reference to them could not be affected by subsequent legislation. *McDade v. Bossier Levee Board*, 109 La. 640, 33 South. 628; *Hall v. Board*, 111 La. 913, 35 South. 976; *Hartigan v. Weaver*, 126 La. 492, 52 South. 674; *State v. Capdevielle*, Auditor, 128 La. 283, 54 South. 820. The most recent case upon the subject is *State ex rel. Atchafalaya Basin Levee Board v. Capdevielle*, Auditor, 142 La. 111, 76 South. 327, in which it was held (quoting from the syllabus) that:

"Act No. 97 of 1890 contemplates that the donation of land to the Atchafalaya Basin levee board therein contained should stand open, indefinitely, for acceptance, and that the land should be conveyed to the board, from time to

time, as requested by it, and that act is unaffected by Act No. 215 of 1908; hence the request which the board now makes of the state auditor and register of the state land office to execute conveyances of the land so donated is as well within the law as it has ever been, and, as the ministerial duty rests upon those officers to comply with that request, mandamus will lie to compel such compliance."

Applying that ruling to the instant case, we can discover no appreciable difference between the position of the plaintiff herein, standing in the place and exercising the rights of the board of commissioners (which by its contract it is expressly authorized to do) and the board itself, if it were before the court, instead of its transferee; and as the board (as between it and defendants) would have the right to demand a title to the land in dispute, so its transferee has the right to protect the title acquired from the board by staying defendants in their attempts to sell the land to a third person.

The judgment appealed from is therefore affirmed.

(79 South, 173)

No. 21530.

**BASILE v. VENTURA.**

(June 29, 1918.)

(Syllabus by Editorial Staff.)

**LIBEL AND SLANDER** ⇐ 112(1)—**UTTERANCE OF WORDS—EVIDENCE.**

In an action for slander based on words slanderous per se, *held*, on the evidence as to defendant's utterance of such words, that the plaintiff's demand was properly rejected and the suit dismissed.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Mrs. Frank Basile against Mrs. Mateo Ventura. Judgment for defendant rejecting plaintiff's demand, and plaintiff appeals. Affirmed.

Chas. V. Macaluso, of New Orleans, for appellant. Legier & Gleason, of New Orleans, for appellee.

O'NIELL, J. The plaintiff appeals from a judgment rejecting her demand for \$10,000 damages. She charges that, at a late hour one night, in the presence and hearing of a large congregation of people in front of her home, the defendant cursed and abused her and applied some very scandalous epithets. It is sufficient to say, for the purpose of this decision, that the remarks, if made, were slanderous per se.

The plaintiff and defendant were rivals in the fruit and vegetable business, and were bitter enemies, having their respective places of residence and business opposite one another, on the same street. On the occasion complained of, the plaintiff's nephew and the defendant's son were engaged in a fist fight in front of their homes, at about 2:30 a. m. The defendant's husband, being aroused from his slumbers, ran out into the street, and, without taking time to investigate, fired a pistol into the air to frighten away the disturbers. The defendant followed her husband out into the street, and, fearing he had done something rash, remonstrated with him and escorted him back into the house. In the meantime, very naturally, the Basile family and kin, as well as the Venturas, and a number of neighbors, were attracted to the fight; and we take it from the very conflicting testimony that some uncomplimentary remarks were uttered by the parents of the one and the uncle and aunt of the other of the combatants. Be that as it may, the witnesses who testified for the defendant were as positive that she did not, as were the plaintiff's witnesses positive that the defendant did, make the remarks complained of in this suit. We do not find a preponderance of evidence in favor of the plaintiff. It appears that her husband and the defendant's husband were arrested, as a result of the quarrel; and each had his day in the recorder's court. We

agree with the district judge that the matter should have ended there.

The judgment appealed from is affirmed, at appellant's cost.

(79 South. 174)

No. 21993.

TOMLINSON et ux. v. VICKSBURG, S. & P. RY. CO.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

1. NEGLIGENCE  $\Leftrightarrow$  33(1)—USE AND CONDITION OF LAND—TRESPASS—CARE REQUIRED.

A property owner owes no duty to trespassers except to avoid injuring them willfully, and is not obliged to guard his premises against intrusion.

2. NEGLIGENCE  $\Leftrightarrow$  39—ATTRACTIVE NUISANCE—DOCTRINE.

The doctrine of responsibility for having on one's premises an inviting or attractive danger to children is confined to cases where the dangerous agency is so obviously tempting to children that the owner is guilty of negligence for failing to observe and guard against the temptation and danger.

3. NEGLIGENCE  $\Leftrightarrow$  39—ATTRACTIVE NUISANCE.

A pile of cross-ties on a railroad right of way, near a public street, was not so inviting or attractive a danger and temptation to small children to play about it that it was negligence for the railroad to fail to observe and guard against danger of injury to them.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Suit by T. R. Tomlinson and wife against the Vicksburg, Shreveport & Pacific Railway Company to recover damages for personal injury to their minor child. Verdict and judgment for plaintiffs for \$6,500, and defendant appeals, and plaintiffs, answering, prayed that the judgment be increased to \$10,000, the amount sued for. Judgment annulled, and plaintiffs' demand rejected.

Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant. Otis W. Bullock, of Shreveport, for appellees.

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O'NIELL, J. The defendant appeals from a verdict and judgment for \$6,500 damages for personal injuries suffered by the plaintiffs' child. The plaintiffs, answering the appeal, pray that the judgment be increased to \$10,000, the amount sued for.

There is no dispute about the facts of the case, except as to matters of no importance in our opinion.

The child, only 20 months old, and her brother, 8 years old, returning from the post office to their home, went upon the railway company's right of way to play upon a pile of cross-ties there. The boy dislodged a cross-tie that he stepped upon, and it fell from the pile upon the little girl's leg and injured her badly.

It was alleged in the plaintiffs' petition that the cross-ties were stacked "adjacent to and by the side of a street, road or public highway," and that they were piled so loosely and carelessly that one of them fell upon the child "while she was passing over and along the street, road or public highway." But the proof is positive and uncontradicted, and it is now conceded, that the cross-ties were not close enough to have fallen into the street or road, and that the offending tie would not have fallen at all if the children had not disturbed it.

The cross-ties did not belong to the railway company. They had been stacked upon the company's right of way for sale and shipment, but had not been accepted nor even tendered for shipment. We do not, however, consider the ownership of the ties important to a decision of the case, because they had been on the defendant's premises a long time, some of them as long as two years before the accident; and we assume that the agents of the defendant company knew the cross-ties were on the premises and consented to their being there.

[1-3] The plaintiffs' case therefore rests upon the doctrine of responsibility for hav-

ing on one's premises an object that is dangerous and attractive to children. The principle had its development, and perhaps its origin in our jurisprudence, in the cases where children were injured on such dangerous and inviting playthings as railroad turntables. Those cases were recognized to be exceptions to the general rule that the property owner owes no duty to trespassers, except to avoid injuring them willfully, and that he is not obliged to guard his premises against intrusion, even by irresponsible creatures. If the departure from that general rule goes very far, it might be quite difficult to say whether any case where a child has been accidentally injured while trespassing on a stranger's premises is within the exception or the rule. The doctrine of responsibility for having on one's premises an inviting or attractive danger to children must be—and we think it has been—confined to cases where the dangerous agency is so obviously tempting to children that the owner is guilty of negligence for failing to observe and guard against the temptation and danger. Almost any object that a little child can climb or play upon is tempting or inviting to him, and almost any such object that is not intended for a child to climb or play upon is dangerous for him to climb or play upon. If a pile of cross-ties is so obviously inviting as a plaything for children that it is negligence, per se, for the owner of the premises not to observe and guard against the danger of such temptation, what should we say of any wood pile or lumber stack, a ladder, fruit tree, or any other object not less tempting to children, nor less dangerous for them to climb or play upon, than is a pile of cross-ties?

We must bear in mind, with due respect to the parents and their children, that the duty of protecting children from the danger of playing upon a pile of cross-ties belongs more to the occupation of rearing children than to the business of handling cross-ties. We do

not mean that there was negligence or failure of duty on the part of the parents in this instance, but merely that there was no negligence or failure of duty on the part of the defendant. The pile of cross-ties was only about 150 feet, and in plain view, from the plaintiffs' residence. They did not, before the accident, complain of the cross-ties being piled so near to their house or to the street or road; and we have no doubt they would have complained, before the accident, if the danger and temptation to the children had been so obvious to any one that it was negligence for the railway company to fail to observe and guard against the danger.

We are constrained to hold that the verdict and judgment appealed from are not supported by the doctrine of responsibility for maintaining an attractive danger.

The judgment is annulled, and the plaintiffs' demand is rejected, at their cost.

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(79 South. 175)

No. 22846.

Succession of McMAHON.

(June 29, 1918.)

*(Syllabus by the Court.)*

1. DISMISSAL AND NONSUIT  $\S$ 56—NONJOINDER OF NECESSARY PARTIES—FAILURE TO AMEND.

Where an exception of nonjoinder of necessary parties is filed, and the trial court gives to the plaintiff sufficient time in which to make the necessary parties defendant, and such parties have not been made defendants in compliance with the order of the court, the suit is properly dismissed as in case of nonsuit.

*(Additional Syllabus by Editorial Staff.)*

2. WILLS  $\S$ 267—CONTEST—PARTIES.

The legatees named in a will are necessary parties to a proceeding to have the will declared void.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Petition by John A. Muldoon and others, alleged legal heirs, against George Herbert,

Jr., executor of the will, of Mrs. Mary McMahon, deceased, attacking the validity of her probated will, and asking that it be declared void. Suit dismissed as in case of nonsuit, and plaintiffs appeal. Affirmed.

Woodville & Woodville, of New Orleans, for appellants. W. O. Hart, of New Orleans, for appellee.

**SOMMERVILLE, J.** Mrs. Mary McMahon left a last will and testament, in which she named several legatees and an executor. The will was admitted to probate, and was ordered executed.

The plaintiffs, four in number, alleging themselves to be the legal heirs of the deceased, filed a petition, attacking the validity of the will, and asking that it be declared null and void. They made the executor the only party defendant.

The executor filed an exception of nonjoinder of parties, insisting that the legatees were necessary parties defendant to the suit. The exception was sustained, and plaintiffs were given 30 days' time in which to amend their petition and make the necessary parties. The executor answered, and when the case was called for trial he moved that the suit be dismissed on the ground that plaintiffs had failed to make the legatees named in the will parties defendant as ordered. The rule was made absolute, and plaintiffs' suit was dismissed as in case of nonsuit.

It is argued on behalf of plaintiffs that the exception of nonjoinder of parties is a dilatory exception, which does not tend to defeat the action, but only to retard its progress, and there was error in the judgment dismissing their suit.

The exception of nonjoinder of necessary

parties is more than a dilatory exception; and, where plaintiffs were given time in which to make necessary parties and failed to do so, we think that the suit was properly dismissed as in case of nonsuit.

[2] The legatees named in the will of the testator were certainly necessary parties to a proceeding to have the testament declared null and void. *Cloutier v. Lecomte*, 3 Mart. (O. S.) 481; *Valsain v. Cloutier*, 3 La. 176, 22 Am. Dec. 179; *Grubb v. Henderson*, 6 La. 51; *Maskell v. Roussel*, 5 Rob. 500; *Succession of Barber*, 10 La. Ann. 28; *Succession of Lacoste*, 139 La. 837, 72 South. 373.

[1] The only matter before the district court, and decided upon, was the exception of the want of proper parties, and that is the only matter before this court.

It was held in the *Succession of George Grover*, 49 La. Ann. 1050, 22 South. 313, where the trial judge had ordered security for costs to be furnished, and the security was not furnished, that the suit was properly dismissed. A similar disposition was made of the case of *Curtis v. Jordan*, 110 La. 429, 34 South. 591, wherein an amendment was twice ordered to be made, and the amendment was not made.

In the case of *St. Charles Street Railway Co. v. Fidelity & Deposit Company of Maryland*, 109 La. 491, 33 South. 574, the court say:

"A person acting in his individual capacity has a right to determine for himself whom he will sue; and though the court in which it is brought may conclude that the action cannot be maintained as against the defendant whom the plaintiff has selected, or that it cannot be maintained as against such defendant without joining other parties as codefendants, and, so holding, may dismiss it, or may leave it optional with the plaintiff to make the proper parties, or else go out of court," etc.

The judgment appealed from is affirmed.

(79 South. 176)

No. 21524.

**SOUTHERN SCRAP MATERIAL CO. v. LIQUIDATING COM'RS OF CARONDELET CANAL & NAVIGATION CO. et al.**

(June, 1918.)

*(Syllabus by the Court.)*

**COURTS  $\Rightarrow$  224(11)—APPELLATE JURISDICTION—SUPREME COURT—TRANSFER OF CAUSE.**

Where the amount sued for, as reduced by the abandonment of a claim for punitive damages, leaves in dispute an amount less than \$2,000, but within the jurisdiction of the Court of Appeal, the appeal will be transferred to that court.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by the Southern Scrap Material Company against the Liquidating Commissioners of the Carondelet Canal & Navigation Company and others. Judgment for plaintiff, and all parties appeal. Appeal transferred to the Court of Appeal for the Parish of Orleans.

Meyer S. Dreifus, of New Orleans, for plaintiff. Benjamin T. Waldo, of New Orleans (Farrar, Goldberg & Dufour and W. C. Dufour, all of New Orleans, of counsel), for defendants Liquidating Com'rs of Carondelet Canal & Navigation Co. McCloskey & Benedict and John J. McCloskey, all of New Orleans, for appellant defendant New Orleans Brewing Co.

MONROE, C. J. Plaintiff sues for the recovery of a certain crane and appurtenances, or, in the alternative, for \$1,500, as the value of the same, with interest, and for \$50 per month from July 1, 1913, as the rental value thereof, to which is added a prayer for \$1,000 as punitive damages. There was judgment for plaintiff in the sum of \$600, from which the litigants on both sides have appealed. The claim for punitive damages has been abandoned; that for rental amounted, at the date of the institu-

tion of the suit (July 24, 1913), to less than \$50, and no evidence was adduced on the trial in its support; from all of which we conclude that this court is without jurisdiction of the appeal.

Agreeably, therefore, to the provisions of Act No. 19 of 1912, it is ordered that this appeal be transferred to the Court of Appeal for the Parish of Orleans; the costs of the appeal to this court to be divided between the litigants in equal proportions.

(79 South. 207)

No. 23164.

NIETO v. HAY.

In re HAY.

(June 29, 1918.)

*(Syllabus by Editorial Staff.)*

**SEQUESTRATION  $\Rightarrow$  17—RIGHT TO BOND.**

On defendant's motion for dissolution of a writ of sequestration, and in the alternative that he be allowed to bond, the trial court must allow defendant to bond, since plaintiff can desire no more than such security.

Suit by David Nieto against William R. Hay, wherein defendant applies for writ of mandamus to issue to the Judge of the Twenty-Sixth Judicial District Court, Parish of St. Tammany, directing him to make an order to dissolve on bond the writ of sequestration issued in the suit. Writ ordered to issue.

Miller & Burns, for relator.

PROVOSTY, J. Plaintiff alleges that on the 18th day of April, 1918, he and defendant entered into an oral agreement of partnership, by which they were to buy out a certain going country store business, and to carry on the same for three years, the defendant to furnish \$5,000, and he his services, and they to divide the profits equally; that he attended to the buying of the business, and to leasing the building in which it was then being carried on, and was in charge as man-

aging partner from May 4th, when the purchase was consummated, to May 29th, when defendant took charge, and excluded him; that the business was purchased, and the lease was taken, and the moneys were deposited, in the name of defendant, but that this was only for convenience, as the agreement was that the business should be conducted in the name of the Hay Mercantile Company; that by reason of the foregoing the defendant is indebted to him in the sum of \$5,000, for the prospective profits of the business for the three years during which it was under the agreement, to continue, and \$2,500 for the injury done to his reputation in the commercial world, and for "the humiliation and mortification to his feelings"; that he has "a right of possession to and a claim to and a privilege upon the movable property of the Hay Mercantile Company," and that "It lies within the power of the said William R. Hay to conceal, part with or dispose of said movables during the pendency of this suit," and he verily fears he will do so; that he himself is a man of no means, and that therefore it would be impossible for him to furnish bond for a writ of sequestration; and hence the court should ex officio order the property to be sequestered. He asked for a personal judgment in the sum of \$7,500, and that the sequestration be maintained, and his privilege be recognized on the sequestered property.

The court ordered the writ to issue, and under it the sheriff took possession of the stock of goods in the store, and of the moneys of defendant on deposit in the local bank and in a New Orleans bank.

Defendant moved the dissolution of the writ, and in the alternative that he be allowed to bond. The court refused both.

Defendant has applied to this court for a mandamus to compel the trial judge to allow him to bond.

We have in the matter of the dissolution

of the writ strong views, but this is not the time to express them. Clearly defendant should be allowed to bond. Why not? What more can plaintiff want than a good bond to answer for any judgment he may obtain. He cites the cases of *Eltrington v. Clarke*, 49 La. Ann. 340, 21 South. 547, and *Boimare v. St. Geme*, 113 La. 830, 37 South. 770. These were suits for settlement of partnership, and the property admittedly belonged to the partnership. Such is not the case here.

It is therefore ordered, adjudged, and decreed that a writ of mandamus issue to Hon. Prentiss B. Carter, Judge of the Twenty-Sixth judicial district court in and for the parish of St. Tammany, directing and commanding him to comply with the prayer of the defendant in the suit of *David Nieto v. William R. Hay*, for an order to dissolve on bond the writ of sequestration issued in said suit.

(79 South. 208)

No. 21193.

RICHARDS v. NYLKA LAND CO., Limited.  
(May 27, 1918. Rehearing Denied June 29, 1918.)

*(Syllabus by the Court.)*

1. TAXATION ~~§~~614—TAX SALE—OBJECT.

The sole object of the state in selling property for taxes is to collect its revenues, and not to destroy rights farther than is absolutely necessary to effect such collection.

2. TAXATION ~~§~~697(4)—TAX SALE—REDEMPTION—"OWNER OR ANY PERSON INTERESTED PERSONALLY."

The words "owner or any person interested personally," as used in section 62 of Act No. 170 of 1898, in defining the class of persons entitled to redeem property sold for taxes, mean not only one who owns by a perfect title, but also include in their meaning, one who possesses as owner.

3. TAXATION ~~§~~697(4)—TAX SALE—RIGHT TO REDEEM.

One who has been in the quiet, open, continuous, and undisturbed possession, as owner, of a lot of ground for a number of years, is entitled, upon complying with the conditions required by law, to redeem property sold for taxes.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Proceeding by Mrs. Edward Richards against Nylka Land Company, Limited, to redeem land from a tax sale. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis Alfred Ducros, of New Orleans, for appellant. Walter S. Lewis, of New Orleans, for appellee.

LECHE, J. At a public tax sale, on August 2, 1910, the treasurer of the city of New Orleans adjudicated to defendant a certain lot of ground with improvements thereon for the unpaid city taxes of the year 1908. Within the time prescribed by law plaintiff offered and attempted to redeem the property by tendering to defendant the amount of taxes, costs, interest, and penalties to which it was entitled, but the latter refused to accept the tender, and the only ground now urged on appeal to justify such refusal is that plaintiff had no right whatever to redeem said property either as owner, legatee, mortgagor, or creditor.

[1, 2] Plaintiff, in her effort to redeem the property, acted in the capacity of owner, and the law upon that subject has been several times reviewed by this court. It is now an established rule, recognized by our jurisprudence, that the word "owner," as used in the revenue law, does not only mean one who owns by a perfect title, but also includes one who possesses as owner. In fact, the text of the statute extends the right of redemption to an "owner or any person interested personally," etc. Section 62, Act 170 of 1898, p. 376. It was said in the case of *Alter v. Shepherd*, 27 La. Ann. 209, in reviewing the effect of a tax sale as to the right of redemption:

"The sole object of the state is to collect its revenues, and not to destroy rights, further than is absolutely necessary to effect such collection; and the right to redeem, we think, still exists in the owner or quasi owner," etc.

Again, in the case of *State ex rel. Busha's Heirs v. Register of Conveyances*, 113 La. 100, 36 South. 902, we said:

"We think that any one may, for the advantage of the owner, as negotiorum gestor, make payment for him of the redemption money, even without his knowledge."

See C. C. arts. 2133, 2134.

In the case of *Bentley v. Cavallier*, 121 La. 60, 46 South. 101, where the adjudicatee at tax sale attempted to deprive the defendant of the right of redemption on the ground that she had no title, this court said:

"One who has possessed a tract of land as owner for a number of years is considered in law as provisional owner, with exclusive rights of entry and possession, and is entitled to redeem the land from a tax sale."

[3] The plaintiff in this case is in a situation very similar to that of Mrs. Cavallier in the last-quoted case. The record shows that she, and before her her late father, from whom she has inherited, have been in the quiet, open, continuous, and undisturbed possession as owner of the property in dispute for a number of years. We are therefore of the opinion that she is entitled to the right of redemption. Her right to redeem was recognized by the judgment appealed from, and that judgment is affirmed.

(79 South. 209)

No. 23124.

STATE v. HIGHTOWER.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1182—CONFESSION OF ERROR—AFFIRMANCE.

Where the brief of the Attorney General on an appeal by the state from a judgment quashing the information acknowledges the trial court's ruling to be right and virtually abandons the appeal, the judgment for that reason will be affirmed.

Appeal from Fourth Judicial District Court, Parish of Lincoln; J. B. Crow, Judge.



J. R. Hightower was indicted for having willfully, unlawfully and knowingly caused the transportation of a named woman through and across the state through a portion of the parish of Lincoln for the purpose of prostitution, and with the intent to induce and compel her to become a prostitute. From a judgment quashing the information, the State appeals. Affirmed.

A. V. Coco, Atty. Gen., and H. B. Warren, Dist. Atty., of Ruston (Vernon A. Coco, of New Orleans, of counsel), for the State. John B. Holstead, of Ruston, for appellee.

LECHE, J. The present appeal is taken by the state from a judgment quashing an information. The brief of the Attorney General acknowledges that the ruling of the trial court accords with his opinion, and he has therefore virtually abandoned the appeal, and for this reason, the judgment appealed from is affirmed.

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(79 South. 209)

No. 23115.

STATE v. BREAUX,

(June 29, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1020 — LOUISIANA SUPREME COURT — APPELLATE JURISDICTION — AMOUNT.

The court has not appellate jurisdiction in criminal cases where a fine exceeding \$300, or imprisonment exceeding six months, has not been imposed.

2. COURTS §224(6) — JURISDICTION OF SUPREME COURT — CONSTITUTIONALITY OF STATUTE.

The Supreme Court is without jurisdiction in a criminal case where a law of the state has been declared to be constitutional.

Appeal from Seventeenth Judicial District Court, Parish of Vermillion; W. W. Bailey Judge.

Leopaul Breaux was convicted of having

violated a labor contract, and he appeals. Appeal dismissed.

A. R. Mitchell, of Lake Charles, for appellant. A. V. Coco, Atty. Gen., and Preston J. Greene, Dist. Atty., of Abbeville (Vernon A. Coco, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. The defendant appeals from sentence imposed upon him of a fine of \$35, or, in default, to serve 40 days in jail.

[1, 2] The case is not within the jurisdiction of this court. State v. Dunn, 105 La. 355, 29 South. 934; State v. Hunter, 114 La. 939, 38 South. 686; State v. Desimone, 143 La. 505, 78 South. 751.

Defendant moved to quash the bill of information against him on the ground that Act 50, 1892, p. 71, making it a misdemeanor to violate labor contracts, was unconstitutional. The motion was overruled, and the statute was declared to be constitutional. No appeal lies in such case. State v. Dunn, 105 La. 355, 29 South. 934; State v. Hunter, 114 La. 939, 38 South. 686; State v. Murray, 116 La. 655, 40 South. 930, 7 Ann. Cas. 957.

The appeal is dismissed.

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(79 South. 210)

No. 21515.

FOREMAN et al. v. CITY OF CROWLEY.

(June 29, 1918.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS §796—BRIDGES OVER DRAINS—RAILING—NEGLIGENCE.

It is not negligence on the part of a city not to put rails at the ends of all bridges which cross drains in the city.

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Suit by Mrs. Louise Foreman and husband against the City of Crowley. Judgment for

defendant dismissing the suit, and plaintiffs appeal. Affirmed.

Shelby Taylor, of Baton Rouge, for appellants. Jas. A. Gremillion, City Atty., Philip S. Pugh, and L. H. Pugh, all of Crowley, and Dennis T. Canan, Jr., for appellee.

**SOMMERVILLE, J.** Plaintiffs appeal from a judgment rejecting their demand for damages against the city of Crowley because of the death of their five year old son, who was drowned from a bridge crossing a drain on the eastern boundary of the city. The negligence and fault alleged against defendant was because of failure to place rails or bannisters on the ends of the bridge.

The bridge in question formed a part of the highway, and extended across Eastern avenue, partly covering a natural drain which extended from one side of the city to the other. Eastern avenue was 75 feet wide, and the bridge crossing it was 16 feet long, from east to west, the direction in which the ditch runs. The evidence shows that the bridge was well built, and in good condition at the time of the accident. It also shows that the little child whose life was lost was on one end of the bridge, playing in the water which filled the ditch. In getting up, his feet slipped, he fell into the water, and he was drowned. Plaintiffs contend that, if a rail had been run along the end of the bridge, the child would not have fallen into the water. But they have failed to prove that it was negligence on the part of defendant not to have put a rail at the end of the bridge. The bridge was of sufficient width and strength to accommodate the traffic on Eastern avenue, which was very limited. It was not shown that the bridge was frequented by children; and the five year old child of plaintiffs was a half mile to a mile from its parents' residence, in the company of two little boys. It has not been deemed necessary in a city of any size to rail all the

bridges crossing drains, and we fail to see where the defendant was negligent in not putting rails across the ends of the bridge referred to.

Judgment affirmed.

(79 South. 210)

(No. 22904.)

**DUPUIS et al. v. DRAINAGE COMRS OF SUBDRAINAGE DIST. NO. 1 OF FIFTH POLICE JURY WARD OF ACADIA PARISH.**

(June 29, 1918.)

*(Syllabus by the Court.)*

**ELECTIONS — 232 — FRAUD OR ILLEGALITY — VALIDITY.**

An election is vitiated by fraud or illegality which affects the result, and upon such showing will be decreed void and of no effect.

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Suit by Joseph Alcide Dupuis and others, citizens and property taxpayers, against the Drainage Commissioners of Subdrainage District No. 1 of the Fifth Police Jury Ward of Acadia Parish, to annul and set aside a special election voting a bond issue. Judgment for defendant, and plaintiffs appeal. Judgment annulled, and judgment ordered in favor of the plaintiffs, declaring the election void.

Gremillion & Smith, of Crowley, for appellants. Percy T. Ogden, Dist. Atty., of Crowley, for appellee.

**MONROE, C. J.** Plaintiffs, citizens and property taxpayers of subdrainage district No. 1 of the Fifth police jury ward of Acadia parish, attack an election held on June 28, 1917, for the submission to the qualified voters of that district of a proposition to impose a tax and incur an indebtedness of \$40,000, and issue bonds therefor. They allege that, according to the returns, 41 votes were cast for and 40 against the tax,

but that the returns are fraudulent and erroneous, in this: That a certain ballot was assumed to have been cast by David Le Blanc, in favor of the tax, and was so counted, but in fact that no ballot, signed or indorsed "David Le Blanc," was taken from the box in the presence of the bystanders; that a ballot, signed or indorsed "David Istre," was taken out, read, called out, and seen by the bystanders and was counted by the commissioners, as being the ballot supposed to have been cast by David Le Blanc; that it should have been stamped "Spoiled Ballot," and not counted, as no such voter as David Istre lives in the district; and that, had it not been counted in favor of the tax, the election would have resulted in a tie. They further allege that they have been informed and believe:

"That the ballot cast in said election, signed or indorsed 'David Istre,' has been fraudulently removed therefrom and another ballot signed or indorsed 'David Le Blanc,' substituted in its place"; that if, "upon the opening of the said ballot box by the court, it be found that the ballot signed or indorsed 'David Istre,' and which should have been declared a 'spoiled ballot,' and so marked and therefore not counted, has been removed from said ballot box, and by reason thereof not found therein, but, on the contrary, should the substituted ballot, signed or indorsed 'David Le Blanc,' be found in said ballot box, then and in that event the said substituted ballot should be declared \* \* \* to have been fraudulently substituted and placed in said ballot box, and should be declared null and void, cast aside, and said election decreed to have resulted in a tie."

Six witnesses, called by plaintiff, testified that one of the commissioners, to whom the tickets were handed, and whose function it was to announce the names inscribed thereon, called the name "David Istre" from a ticket that he was holding in his hand, and a majority of the six testify that, immediately, some discussion took place between him and the commissioners who were keeping the tallies, to one of whom the ticket was handed. One of the witnesses, who was standing quite near the commissioner, who,

as he says, called "David Istre," testifies that he saw that name written on the ticket; that it was plainly written. One of the tally sheets shows that the name "David Istre" was first written upon it, and then the name "David Le Blanc" substituted therefor. A ticket bearing the name "David Le Blanc" was brought out of the box upon the trial, and one of the commissioners testified that it was he who wrote Le Blanc's name on it. Le Blanc is, apparently, illiterate, but states that he can write his name. He also states that he voted, but is unable to remember who fixed his ticket for him. The ticket was offered in evidence by both sides, but plaintiffs' counsel caused the following note to be made, to wit:

"Counsel for plaintiffs wishes it to be noted on the note of evidence that the said ballot is the only one of the 81 or 82 tickets that were brought out of the box on the trial that had no sign of a crease of fold in it."

And the fact noted remains unchallenged and unexplained; the suggestion in the brief of defendant's counsel not amounting, in our opinion, to an explanation. Four of the five commissioners who were called to the stand testified, either that they did not hear the other commissioner call the name "David Istre," or that it was not called. Among the last of the witnesses who came to the stand, however, was the commissioner who is said to have called the name, and part of his examination reads as follows:

"Q. It has been stated by some of those voting against the tax at said election that you, in calling out the names, called that of David Istre three times, continuously; is that true or not true? A. I may have called David Istre. I may have made that error; but I corrected it, and I can prove it by witnesses, too."

#### Cross-examination:

"Q. Are you prepared to swear whether there was any discussion as to the name of David Istre when called from the ticket in your hands? A. There was. Q. By whom? A. By us; Du-hon had written the name 'Istre' on the tally sheet, and he was looking for Le Blanc. I had

called Le Blanc, undoubtedly. I called Istre, and Mr. Fruge said it was Le Blanc."

Why, holding in his hand a ticket with the name David Le Blanc written on it, the witness should have read it "David Istre," is not explained; nor is it explained why defendant's witnesses deny that he did so read it. The explanation that suggests itself to the mind for the writing of the name David Istre on the tally sheet is that the commissioner was there to write down the names as they were called from the tickets, and hearing the name Istre called, he wrote it down. But that is not the explanation that the commissioner gives. He explains as follows:

"I wrote Istre on the tally sheet by mistake, and the reason why I made that mistake—how it happened—one of his half-brothers is an Istre, and, one time, I wrote him a check, and forgot the name, and wrote it Istre, and he said, 'Not Istre, but Le Blanc.'"

It is undisputed that there was no David Istre living in the district. There is considerable conflict in the testimony upon the subject of the ballot box. Some of the witnesses testify that it was not sealed when taken away by a pro-tax commissioner, after the election; others, that it was sealed. No ticket bearing the name "David Istre" was produced from the box on the trial, and the "David Le Blanc" ticket still looks as if it had just come from the printer, while the others, without exception, are creased and crumpled. Our conclusion is that the "David Istre" ticket was deposited in the box, prepared in that form by the person who undertook to fix Le Blanc's ticket for him, that the error was discovered when Istre's name was called by the commissioner, and that the attempt was made to correct it by putting the Le Blanc ticket in, and taking the Istre ticket out, of the box. But that was too late; it was after the election, which was therefore vitiated.

The judgment appealed from is accord-

ingly annulled, and it is now ordered and adjudged that there be judgment in favor of plaintiffs setting aside the returns, decreeing the election of June 28, 1917, here attached, to be void and of no effect, and condemning the defendant to pay all costs.

(79 South. 212)

No. 22984.

# LOUISIANA RY. & NAV. CO. v. RAILROAD COMMISSION OF LOUISIANA.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

RAILROADS ~~§~~ 225—CONSTRUCTION AND OPERATION—MAINTENANCE OF PRIVATE SPUR.

Where plantation owner contracted for private spur track between two regular shipping stations, each less than two miles away from the spur, spur being accessible to public only by private road, railroad could not be required to maintain spur at own expense, on ground of increase of traffic.

Appeal from Twenty Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Suit by the Louisiana Railway & Navigation Company against the Railroad Commission of Louisiana. From a judgment for plaintiff, defendant appeals. Affirmed.

W. M. Barrow, Asst. Atty. Gen., for appellant. Wise, Randolph, Rendall & Freyer, of Shreveport, for appellee.

PROVOSTY, J. The plaintiff company and Mr. Blakewood entered into a contract by which Mr. Blakewood was to do the grading and furnish cross-ties for the construction and maintenance of a spur on his plantation for the use of his cotton gin, and otherwise for his exclusive use, and the plaintiff company was to furnish the other necessary materials and have the work done. The contract contains many stipulations not necessary to be here recited. This was in 1900.

In the course of time, Mr. Blakewood refusing to furnish cross-ties needed for repairing the spur, which had become unsafe, the plaintiff company closed it. Thereupon Mr. Blakewood, and others of that neighborhood who found the spur convenient, obtained an order from the defendant commission to the plaintiff company to maintain the spur. There is a regular station, with all shipping facilities, 1.6 miles above this spur, and another 1.9 miles below it. The spur is inaccessible to the public, except by a private road, which, of course, the owner may close at any time. The contention is that the traffic there has become so great as to justify the railroad's having to maintain this spur at its sole expense in the interest of the public. This traffic is stated with exactness from the records of the plaintiff company. From July 1, 1915, to June 30, 1916, it consisted of three cars of cotton seed and two cars of cane shipped by Mr. Blakewood; and from June 30, 1916, to June 30, 1917, it consisted of two cars of cotton seed and four cars of cane shipped by Mr. Blakewood, and one car of lumber and two cars of live stock and household goods received by a Mr. Bond, and, as we understand, one other car of lumber. These years were the two immediately preceding the hearing of this case before the defendant commission. The spur is necessary, it will be remembered, only for carload shipments. Mr. Bond was moving into that neighborhood; hence the shipments to him.

We see in this spur nothing but a plantation spur, for the private benefit, virtually, of Mr. Blakewood, and which, therefore, he should contribute towards the maintenance of, according to his contract. No good reason can be given why, if the plaintiff railroad is to maintain this spur at its sole expense, it should not do the same with all the plantation spurs along its line, and all the other railroads do the same with all the private spurs along their lines. Most of these private spurs do many times the volume of car-

load traffic that this spur appears to have been doing.

We do not see that, for traffic other than carload, the plaintiff company should be required to furnish greater facilities than it has done already; the regular public traffic stations in that neighborhood being less than 4 miles apart, or either one less than 2 miles distant from this spur.

The judgment appealed from, annulling said order, is affirmed, at the costs of defendant.

O'NIELL, J., concurs, except as to costs.

(79 South. 212)

No. 28129.

GAIENNIE v. DRUILHET.

In re GAIENNIE.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

1. PLEADING  $\S$  11—MATTERS OF EVIDENCE—SECONDARY EVIDENCE.

Under Code Prac. art. 172, requiring only that plaintiff allege a cause of action, in contest of primary election because nonresidents were allowed to vote, testimony of bystanders, who had seen ballots and could testify as to contents, was not inadmissible because of absence of allegation of fraud in conduct of election, or of the ballot boxes not having been safely kept.

2. ELECTIONS  $\S$  28—SECRECY AS TO VOTE.

A legal voter cannot be required to divulge, on or off the witness stand, for whom he voted, but an illegal voter, as a nonresident, can be required.

Certiorari to Court of Appeal, Parish of Iberia.

Election contest by Florian J. Gaiennie against F. J. Druilhet, resulting in judgment for defendant in the district and circuit courts, whereupon plaintiff applied for certiorari or a writ of review to the Court of Appeals, which denied the application, and plaintiff appeals. Judgments below set aside, and case remanded.

Weeks & Weeks, of New Iberia, for appellant. E. S. Broussard, of New Iberia, for respondent.

PROVOSTY, J. [1] Plaintiff's competitor in a primary election held under Act 35, p. 66, of 1916, for mayor of the town of Jeanerette, was returned elected by majority of 1, 71 to 70. Plaintiff contests on the ground that three nonresidents, not entitled to vote, were allowed to vote, and voted for, and were counted for his competitor. The ballot boxes not having been kept in the manner required by law, so as to be safe against tampering, but, on the contrary, having been kept in a manner which afforded a full opportunity for any one to tamper with them who might desire to do so, plaintiff took the position that the ballots therein had lost their value as evidence (9 R. C. L. 154), and that the only reliable evidence available as to whom the three alleged nonresidents in question had voted for was the testimony of the bystanders who had seen the ballots and could testify to their contents. The trial court and the Court of Appeal held that, in the absence of any allegation of fraud in the manner of the conduct of the election, or of the ballot boxes not having been safely kept, this secondary evidence was inadmissible. This ruling appears to us to be unsound. The question is not one of pleading, but of evidence. A litigant is not required to make any allegation touching the evidence by which his case is to be supported. He need only allege his cause of action. C. P. art. 172. The evidence by which he is to establish it is an entirely different thing. The laying of a predicate for the admission of secondary evidence is a matter of evidence, not of pleading. The manner in which the ballot boxes were kept subsequently to the election, whereby the ballots lost their probative character, formed no part of plaintiff's cause of action. It was not because of the ballots having been thus loose-

ly kept that plaintiff claimed to be entitled to the office, but because he had received a majority of the legal votes, and a different result had been made to appear by reason of the three illegal votes in question having been received and counted for his adversary.

[2] Another ruling of our brethren below was in not compelling the said three alleged nonresident voters to testify for whom they voted. A legal voter cannot be required to divulge, on or off the witness stand, for whom he voted. *Tullos v. Lane*, 45 La. Ann. 333, 12 South. 508; 15 Cyc. 423; 9 R. C. L. 142. But the same is not true of an illegal voter. 15 Cyc. 424; 9 R. C. L. 142. If, therefore, the plaintiff should succeed in showing to the satisfaction of the trial court that the three voters in question were nonresidents, and not qualified voters at said election, the secrecy protecting legal voters would not stand in the way of the said three voters being required to divulge for whom they voted.

The judgment of the district court and also that of the Court of Appeal are therefore set aside, and the case is remanded, to be proceeded with according to law, and the views in the present opinion expressed. The defendant to pay the costs of the application for certiorari.

(79 South, 213)

No. 21345.

LOUISIANA NAV. CO., Limited, v. OYSTER COMMISSION OF LOUISIANA et al.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR §1099(3)—SUBSEQUENT APPEAL—LAW OF CASE.

Under former decision against plaintiff company on its charge that defendants trespassed on navigable waters and streams within its grants, an exception of no cause of action, pleaded against its supplemental and amended petition, charging no other trespass, was properly sustained.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by the Louisiana Navigation Company, Limited, against the Oyster Commission of Louisiana and others. Exception of no cause of action sustained, and plaintiff appeals. Affirmed.

J. C. & Thos. Gilmore, of New Orleans, and Edward N. Pugh, of Donaldsonville, for appellant. A. V. Coco, Atty. Gen., and Harry Gamble, Asst. Atty. Gen. (John Dymond, Jr., of New Orleans, of counsel), for appellees.

LECHE, J. On the 17th of January, 1910, a decision was rendered by this court, in which, although the case was remanded, we expressed an opinion adverse to the principal claims and pretensions of plaintiff in the above cause. See opinion in case No. 17594, reported in 125 La. 740, 51 South. 706.

We therein held that the grants under which plaintiff claims, being lands bordering upon and partially surrounded by the tidewater of the Gulf of Mexico, carry its title no farther than high-water mark, and that, in so far as plaintiff asserts ownership and possession, under such titles, of land lying beneath the waters which surround the tracts of dry land included in said grants, or lying beneath any navigable passes or channels, which intersect such tracts or separate them from each other, the exception of no cause of action was properly maintained. We further held that it did not follow, however, that the petition, taken as a whole, fails to disclose a cause of action, since its allegations are broad enough to import a charge of trespass with respect to the dry land as well as the submerged land, and though the charge is not as specific as the defendants have a right to require, it cannot properly be said that it does not show a cause of action. We further stated that, moreover, it seemed not unlikely that there may be nonnavigable streams, pools, ponds, and

wet places, within the borders of the dry land covered by plaintiff's grants, as that plaintiff would be entitled to hold them as included therein, and yet, with respect to which, defendants may hereafter insist that the judgment appealed from constitutes *res judicata*. Wherefore, with a view of affording plaintiff an opportunity to amend its petition within a delay to be fixed by the trial judge, by setting forth specifically the particular places or portions of its property upon which the alleged trespass has been committed, together with the time and manner of the trespass, the judgment appealed from was set aside, and the case remanded to the district court, to be proceeded with in accordance with the views therein expressed.

After the cause, in accordance with our decree, had been reinstated on the docket of the civil district court, plaintiff filed a supplemental and amended petition, in which it recited that it had obtained a writ of error from the Supreme Court of the United States to the judgment and decree thus rendered by this court on January 17, 1910, but that said judgment not being final in form, said writ was, for that reason, dismissed. Plaintiff then proceeds in said supplemental petition to allege that the lands comprised within its titles, based upon previous surveys of the United States government, contain no navigable channels or navigable waters subject to the application to tide or ebb and flow of the tide as a test of navigability, if there be any foundation in this country for the distinction attempted, which is misleading and has led to error in this case. Then follow allegations grouped into nine different paragraphs, in the nature of an argument attacking the correctness of the legal conclusions arrived at, and as expressed by us in our former opinion. Plaintiff did not attempt, in its supplemental and amended petition, to set forth specifically the particular places or portions of its property, the dry lands, the

nonnavigable streams, pools, ponds, and wet places within the borders of the dry lands covered by its grants, upon which the alleged trespass was committed by the defendants, nor the time and manner of the alleged trespass. Having failed to make such allegations in its supplemental and amended petition, the conclusion is irresistible that it could not truthfully do so, and that its real source of complaint, the only trespass charged and chargeable to defendants, is that alleged to have been committed upon submerged lands forming the bed of navigable waters. So that all doubt being now removed as to the fact that plaintiff neither pretends nor charges that defendants committed any trespass upon its dry lands or upon nonnavigable streams, pools, ponds, and wet places within the borders of its grants, and having in our former opinion in the appeal No. 17594 reached adversely to plaintiff's contention the conclusion to which we still adhere, that its complaint as to any trespass charged against defendants on the navigable waters and streams within the delimitation of its said grants failed to show a legal cause of action, the exception of no cause of action, pleaded by defendants against plaintiff's supplemental and amended petition on the district court, should be and was properly sustained.

The judgment appealed from is therefore affirmed.

(79 South. 214)

No. 21522.

MILLIKEN & FARWELL v. AMERICAN  
SUGAR REFINING CO.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

SALES  $\Leftrightarrow$  178(4) — ACCEPTANCE — WEIGHING  
AND SAMPLING.

Under a contract for the sale of sugar "to be sampled, weighed and tested according to the usual custom upon arrival," the act of the buyer's superintendent in suggesting that the

barge be moved to the ship's side as a matter of convenience, without assuming responsibility for its safety, was not an acceptance of delivery dispensing with weighing and sampling.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by Milliken & Farwell against the American Sugar Refining Company. Judgment for defendant rejecting plaintiffs' demand, and plaintiffs appeal. Affirmed.

Dart, Kernan & Dart and Grant & Grant, all of New Orleans, for appellants. Carroll, Henderson & Carroll and Denegre, Leovy & Chaffe, all of New Orleans, for appellee.

O'NIELL, J. The plaintiff contracted to sell and deliver to the defendant 36,000 bags of centrifugal first sugar, 96 test, at  $3\frac{5}{16}$  cents per pound. Delivery was to be made at the defendant's Chalmette Refinery or at the Southern Pacific Company's Algiers or Gretna docks, "all sugar to be sampled, weighed and tested, according to the usual custom, upon arrival."

Delivery "at the Chalmette Refinery" was understood and interpreted by both parties to mean that the sugar should be delivered on the wharf in front of the refinery, or on board a ship if one was there ready to receive the sugar when a boat load or barge load would arrive. Delivery of each barge load of sugar was effected by a sampling and weighing by representatives of both parties as the bags of sugar were transferred from the barge to the wharf, if there was no ship ready to receive it, or from the barge to the ship, if there was one ready to receive it.

The barge load of sugar in contest, containing 1,000 sacks, weighing 356,042 pounds, was delivered by plaintiff to a tugboat or transportation company, to be towed from Stanton Plantation to the wharf at Chalmette.

The tug and barge arrived at the Chalmette wharf at 4 o'clock in the afternoon.



As the bargemen were unable to unload the sugar that evening, the barge was tied to the wharf, and the tug had cast off and moved out into the river about 150 feet, when the captain was called back by the tugboat's river clerk and directed to place the barge beside a ship near by, under charter to the defendant. The river clerk had accompanied the barge from Stanton Plantation to the Chalmette wharf, and it was at the suggestion of the superintendent of the sugar refinery that he directed the captain of the tug to remove the barge from the wharf to the ship's side. The barge was tied beside the ship and left in charge of a watchman from the tugboat. Waves from the ships that passed in the night washed over and tilted the barge, causing 730 bags of sugar to slide into the river and be lost. The remaining sugar, some of which was damaged by water, was salvaged by the defendant, at the request and for account of the plaintiff.

This suit was brought for the price of the 356,042 pounds of sugar, \$11,793.89, on the allegations merely that the sugar was sold and actually delivered to the defendant at the price stated. The defense was that the sugar was not delivered. Judgment was rendered in favor of the defendant, rejecting plaintiff's demand; and the latter appealed. Thereafter the defendant paid plaintiff the value of the salvaged sugar, \$1,687.81, under an agreement that plaintiff's demand in this suit should be reduced that much and without prejudice to the rights of either party hereto.

We have ignored certain side issues which need not be considered in our view of the case. That view is that the case is governed by the provisions of article 2458 of the Civil Code, that, when goods are sold, not in bulk, but by weight, count, or measure, the sale is not complete, inasmuch as the goods so sold are at the risk of the seller, until they are weighed, counted, or measured. In this case, the sugar was to be weighed and

sampled by the buyer, as well as the seller, at the place of delivery. The weighing and testing that was done by the plaintiff when the sugar was loaded upon the barge was not a compliance with the stipulation that the sugar was "to be sampled, weighed and tested, according to the usual custom, upon arrival."

The contention of the plaintiff is that the act of the superintendent of the refinery, directing that the barge be removed from the wharf to the ship's side, was an acknowledgment that delivery had been made at the wharf, or an acceptance of delivery there. We do not think so. The evidence satisfies us that the superintendent did not order or direct, but merely suggested, that the barge be placed beside the ship, as a matter of convenience. It does not appear that either he or the river clerk thought that he (the superintendent) assumed responsibility for the safety of the barge, or dispensed with the weighing and sampling that was necessary to complete the sale.

In the case of *Fearn, Donegan & Co. v. Maltby*, 9 La. Ann. 8, from which the learned counsel for plaintiff quote, the sugar that was held to be at the risk of the buyer had been weighed and accepted by him, receipted for, and hauled from the sugar house to the bayou bank for shipment by the buyer. The decision in *Larue & Prevost v. Rugely, Blair & Co.*, 10 La. Ann. 242, also cited by appellant, was merely an affirmation of the statement in article 2458 of the Civil Code; and, in the third case cited, *D. Kelham & Co. v. Carroll, Hoy & Co.*, 20 La. Ann. 111, the decision rested upon a stipulation that the cotton sold by weight "should remain on the plantation at the risk of the purchasers until called for by them." The decisions cited by counsel for appellant are therefore not at all opposed to the decision rendered in this case.

The judgment appealed from is affirmed, at appellant's cost.

(79 South. 215)

No. 23137.

DAVENPORT v. STERLING LUMBER CO.

In re DAVENPORT.

(June 29, 1918.)

*(Syllabus by Editorial Staff.)***1. CERTIORARI §37—APPLICATION FOR WRIT—PARTIES—INFORMALITY.**

The informality of applying for a writ of certiorari directly in the name of the applicant, instead of in the name of the state on the relation of the applicant, is not fatal, where the petition otherwise discloses a right to the writ.

**2. PROHIBITION §19—APPLICATION—PARTIES—INFORMALITY.**

The informality of applying for a writ of prohibition directly in the name of the state of the applicant, instead of in the name of the state on the relation of the applicant, is not fatal, where the petition otherwise discloses a right to the writ.

**3. APPEAL AND ERROR §458—SEQUESTRATION—SUSPENSIVE APPEAL FROM ORDER OF BONDING.**

If the setting aside of a judicial sequestration obtained on defendant's suggestion, upon plaintiff's furnishing bond, would cause an irreparable injury to defendant, an order for a suspensive appeal from the order of bonding was properly issued, and otherwise not.

**4. SEQUESTRATION §17—SETTING ASIDE ON BOND—DISCRETION OF JUDGE.**

A trial judge has a discretion in setting aside a judicial sequestration on bond, as before permitting one of the parties to set it aside he must necessarily believe that his action will not cause irreparable injury to the other party.

**5. SEQUESTRATION §5—JUDICIAL SEQUESTRATION OF RIGHTS OF PARTIES.**

Where property rights are involved and it is necessary to maintain the status quo, a judicial sequestration is often the only safe manner of conserving the rights of the parties.

**6. APPEAL AND ERROR §97—SEQUESTRATION—DISSOLUTION ON BOND—APPEAL.**

Where a sequestration obtained to protect a property right is dissolved on bond, the order of dissolution is appealable.

Action for injunction by J. A. Davenport against the Sterling Lumber Company. Judgment for plaintiff, and defendant appealed to the Supreme Court both suspensively and devolutively and perfected its appeal, and thereafter the district court, on defend-

ant's suggestion, issued a writ of judicial sequestration and plaintiff bonded the sequestration, and defendant was granted a suspensive appeal from the order of bonding, and plaintiff applies for writs of certiorari and prohibition to quash such order of appeal and to restrain the District Judge from interfering with the order bonding the sequestration. Writs refused.

Stubbs, Theus, Grisham & Thompson, of Monroe, for applicant. H. Flood Madison, of Bastrop, for respondent.

LECHE, J. Plaintiff, claiming to be the owner of certain lands and the timber thereon, and alleging that defendant was depre-dating on said lands and cutting and removing the timber therefrom, enjoined defendant from further trespassing upon his said property. Defendant answered, and after due trial judgment was rendered in favor of plaintiff, maintaining the writ of injunction. From that judgment defendant appealed to this court both suspensively and devolutively, and perfected its appeal.

Thereafter, the district court, on suggestion of defendant, issued a writ of judicial sequestration and caused the sheriff to seize and take into his possession all the timber in controversy. Plaintiff, having obtained from the district judge an order to that effect, then bonded the sequestration. In due time the judge then granted to defendant a suspensive appeal from the order of bonding, and the writs of certiorari and prohibition, presently applied for by plaintiff, are asked for the purpose of quashing and annulling said order of appeal and of restraining the district judge from in any manner interfering with, setting aside, or suspending the order bonding the sequestration.

The answer of respondent judge after suggesting that plaintiff's application is not in due form, being made in his own name instead of on the part of the state on the rela-

tion of plaintiff, sets out the pleadings substantially as above set forth, and alleges that in the opinion of respondent, the controversy between the parties being over the ownership of the timber, its status as property should be preserved until the question of ownership is definitively settled, and, with that purpose in view, the judicial sequestration was issued. Respondent further alleges that he permitted the writ of judicial sequestration to be bonded on the authority of *Jackson v. Crillon et al.*, 121 La. 59, 46 South. 101, and that he granted the order for a suspensive and devolutive appeal from said bonding order for the reason that in his opinion parties aggrieved have the constitutional and legal right of appeal from all final judgments. All of which is respectfully submitted for such action as this court may deem proper in the premises.

[1, 2] The informality suggested by the respondent judge, that plaintiff's application for writs of certiorari and prohibition should have been made in the name of the state of Louisiana on the relation of plaintiff, instead of being made directly in the name of plaintiff, has several times been passed upon by this court. Such an informality, where the petition otherwise discloses a right to the writ, was held as not fatal, in the cases of *Malain v. Judge*, 29 La. Ann. 793, *Morris v. Womble*, 30 La. Ann. 1312, and *State ex rel. Dardenne v. Cole*, Judge, 33 La. Ann. 1356. The allegations of the application being otherwise sufficient, and the prayer thereof being specifically for the issuance of the writs, respondent's exception to the form of plaintiff's application is overruled.

[3] The question to be decided in this proceeding is whether the order issued by the respondent judge, setting aside the judicial sequestration on plaintiff furnishing bond, might cause an irreparable injury to defendant. If it should have that effect, then the order for a suspensive appeal from the

order of bonding was properly issued; otherwise, it should have been refused. It may seem that the respondent, in permitting the plaintiff to bond the sequestration, was of the opinion that the order to bond did not cause defendant irreparable injury, and that in permitting the defendant to appeal suspensively from that order he was of a contrary opinion, and therefore that his action in granting the appeal was inconsistent with his action in granting the order to bond. But this is explained by respondent's interpretation of the decision in *Jackson v. Crillon*, 121 La. 59, 46 South. 101. He construed that decision to mean that any judicial sequestration, regardless of its character, may be bonded, that it virtually deprives a trial judge of all discretion in such matters, and gives the adverse party an absolute right to bond any and every judicial sequestration. Having then complied with the duty, in ordering the setting aside of the sequestration on bond, which he construed to be merely ministerial on his part, he then exercised his judicial discretion when presented with an application for a suspensive appeal, and permitted the defendant to suspend by appeal what he considered to be an impending irreparable injury to defendant.

[4, 5] We are of the opinion that the decision in the *Jackson Case*, even if its language should so justify, should not be given the effect of depriving the judge of all discretion in setting aside judicial sequestrations on bond. There are numerous decisions to the contrary. A trial judge must of necessity, before he permits one of the parties to set aside a judicial sequestration on bond, believe that his action in so doing will not cause the other party irreparable injury, and the question of irreparable injury is addressed to his judicial discretion and must primarily be determined by him. Where property rights are involved, and it is necessary to maintain the status quo, a judicial sequestration is often

the only safe manner of conserving the rights of the parties. See *State ex rel. Jennings-Heywood Oil Syndicate v. De Bafflon*, Judge, 113 La. 619, 37 South. 534; *Boimare v. St. Geme*, 113 La. 830, 37 South. 770; *State ex rel. Roth v. Judge*, 38 La. Ann. 49; *Interstate Land Co. v. Doyle*, 120 La. 46, 44 South. 918; *Hecker v. Bourdette*, 121 La. 467, 46 South. 575; *Schwan v. Schwan*, 52 La. Ann. 1183, 27 South. 678.

[6] The issue here presented, although substantially the same, is not whether the respondent, judge failed to exercise his discretion in permitting the plaintiff to bond the judicial sequestration, but whether he properly exercised that discretion in granting defendant a suspensive appeal from the order to bond. We believe that he did properly exercise that discretion, as the matter here involved is the preservation of property rights.

In the quoted case of *Hecker v. Bourdette*, 121 La. 467, 46 South. 575, it was held that, where a sequestration obtained for the purpose of protecting a property right is dissolved on bond, the order of dissolution is appealable. That decision controls the present case, and we hold that the appeal obtained by defendant, *Sterling Lumber Company*, was properly granted.

For these reasons, the writs applied for by plaintiff are refused, at his cost.

MONROE, C. J., concurs in decree.

(79 South. 217)

No. 22148.

WHITESIDE et al. v. LAFAYETTE FIRE INS. CO.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

1. HUSBAND AND WIFE ~~§~~224 — ACTION — PROCESS—NOTICE OF SEIZURE.

In view of Rev. St. § 3629, and Code Prac. arts. 182, 192, a citation and notice of seizure

in a suit against a husband and wife served only on the husband was not a good service upon the wife, where she was sued for his debt, and made no appearance and received no notice of judgment.

2. INSURANCE ~~§~~329—FORFEITURE OF POLICY —POSSESSION OF INSURED—SEIZURE.

A policy of insurance by its terms avoided by a change of insured's possession will not be annulled by an illegal and fictitious seizure, where there was neither an actual nor a valid seizure of the property insured.

3. INSURANCE ~~§~~602—FAILURE TO PAY PENALTY—STATUTE.

Under Act No. 168 of 1908, statutory damages and attorneys' fees may be imposed upon an insurer withholding money on the indefensible ground of a change of possession avoiding the policy.

Appeal from Civil District Court, Parish of Orleans; Geo. H. Théard, Judge.

The suit by Mrs. Sidney J. Whiteside and others against the Lafayette Fire Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Dart, Kernan & Dart, of New Orleans, for appellant. Girault Farrar and Arthur B. Leopold, both of New Orleans, for appellees.

O'NIELL, J. This is a suit on a fire insurance policy for \$4,000 on a residence that was totally destroyed by fire. The plaintiffs are the assured and a mortgage creditor, the latter claiming \$1,500, secured by the New York standard mortgagee clause. They obtained judgment for the amount of the policy, with legal interest after 60 days from the date of the fire, and with \$480 statutory damages and \$400 attorney's fees.

Of the several defenses made to the suit, only two are urged on appeal, viz.:

(1) That before and at the time of the fire, the property was under seizure by the sheriff, in the execution of a judgment against the assured, operating a change of possession, and thereby annulling the policy, according to its terms.

(2) That, in any event, there is no authority for imposing upon the defendant the penal-

ty of statutory damages or attorney's fees; the Act No. 168 of 1908 being authority for imposing such penalties only when an insurance company has willfully refused to pay what it owes; whereas in this case the company defended in good faith.

The plaintiffs' reply to the main defense is that there was no actual seizure of the property, but only a fictitious or constructive seizure, which was null, not only because there was no notice of seizure, but because the judgment purporting to authorize the seizure was an absolute nullity, rendered without citation, on a debt of the husband of the assured.

The facts relating to the alleged seizure are as follows: The property alleged to have been seized to satisfy a judgment against the assured belonged to her separately, not to the marital community. Suit was filed against her and her husband for a grocery bill amounting to \$182.40. The petition disclosed no cause of action whatever against the wife, the allegation being merely that the petitioner had sold goods and merchandise to the defendants at various times as shown by the itemized bill annexed to the petition. The itemized bill, covering a period of seven months, showed more than 700 small purchases of groceries, the largest single item being 80 cents. There was a small purchase on almost every day—not a skip of two consecutive days. The account showed plainly, therefore, that the groceries were bought for consumption, not for resale by a merchant. It was not alleged that Mrs. Whiteside was a public merchant; nor was there any allegation of fact that would make her liable for a bill of groceries sold to the husband and wife. In fact, it was not even alleged that the husband and wife were liable in solido, although the prayer of the petition was for a judgment against them in solido, and the judgment was rendered accordingly. There was no prayer nor order that the wife be authorized, either by her husband or by the judge, to defend the suit or

stand in judgment. Two citations were issued, one addressed to the husband and the other to the wife; and both were served upon the husband in person, not even at the domicile or residence of the wife, as far as the return shows. As neither defendant answered or appeared in court, the plaintiff got judgment by default. A notice of judgment was served only upon the husband, addressed to him alone.

Mrs. Whiteside's property being situated in the parish of Jefferson, the sheriff undertook to levy a constructive seizure, according to the provisions of sections 3625 to 3629 of the Revised Statutes, for making seizures in the parishes of Orleans and Jefferson. In those parishes the sheriff is not required to take actual possession of property to make a valid seizure. The method of seizure is for the sheriff to serve a notice of seizure upon the owner of the property; cause a copy of the notice to be recorded in the office of the recorder of mortgages; enter in what is called the "Seizure Book," in the sheriff's office, a description of the property, making note of the day and hour of recording the notice of seizure in the mortgage office; and make a return on a copy of the notice of the service and date and hour of recording the notice. Section 3629, R. S., declares that the recording of the description of the property and notice of seizure shall be deemed and considered as the seizure and possession by the sheriff, and that it shall be unnecessary to appoint a keeper.

Of course, that section of the law means that the recording of the notice of seizure shall have that effect provided it has been preceded by the other formalities required, such as the service of a copy of the notice of seizure. In this case service of the notice of seizure addressed to Mr. and Mrs. Sidney Whiteside was made by delivering a copy to Mr. Whiteside alone—not even at the domicile or residence of his wife, as far as the record

shows. She testified—and there is no reason for doubting her statement—that she did not know, until she was apprised in the present suit, that her property had been seized, or that judgment had been rendered against her, or even that she had been sued. It appears that she paid the grocery bill after the fire, with the avails of other insurance on her house; but there was nothing in the nature of a ratification of the proceedings that had been taken against her without her knowledge.

The defendant here contends that service of the notice of seizure upon the husband gave constructive notice to the wife; and in support thereof the learned counsel cite articles 182 and 192 of the Code of Practice, referring to service of citation upon a married woman. Article 182 declares that, if the defendants in a suit be husband and wife, it is sufficient to deliver one citation and one copy of the petition to the person representing the defendants; and article 192 declares that, if the petition and citation be directed against a married woman not separate from bed and board from her husband, service may be made by delivering the citation and copy of the petition to either the husband or the wife.

[1] That method of serving citation upon a married woman cannot be applied to a notice of seizure in a case like this, where the wife was sued for a debt of the husband, was not cited either in person or by service at her domicile or residence, made no appearance in the case, and received no notice of judgment. Such a proceeding would abolish altogether the protection afforded a married woman and her separate property against the debts of her husband. The peculiar circumstances of this case render it unnecessary to say whether the provisions of the Code of Practice for serving citation on a married woman have application to the service of a notice of seizure, particularly for a fictitious or constructive seizure in the method provided especially and

only for the parishes of Orleans and Jefferson. The married woman in this case had no notice or opportunity whatever to defend herself or her separate property against the debt of her husband.

[2] In *McClelland v. Greenwich Insurance Co.*, 107 La. 124, 31 South. 691, it was held that a mere formal seizure, without a taking of possession of the property insured, did not invalidate the insurance, under the provisions in lines 20, 21, and 22 of the New York standard policy contract. It is true the seizure in that case was levied in a parish other than Orleans or Jefferson; that is, in a parish where the taking of actual possession by the sheriff was essential to a valid seizure. But the ruling, as shown by the concluding sentence in the opinion, rested upon the decisions holding that none but actual seizure operates a change of possession so as to render an insurance policy void.

Whatever may be said of the effect of an actual, but illegal, seizure, or of a valid, though only fictitious, seizure, of property insured, we find no authority nor reason for holding that a policy of insurance should be annulled by an illegal and fictitious seizure. It is sufficient to say in this case that there was neither an actual nor a valid seizure of the property insured. The judgment appealed from in that respect is correct.

[3] The imposition of the penalty, of having to pay statutory damages and attorney's fees, is plainly authorized by Act No. 168 of 1908, p. 226. The statute declares that, if an insurance company fails to pay the amount of loss due an assured within 60 days from the date of proof of loss, or from the date of adjustment and ascertainment of liability, after demand made therefor the company shall be liable to pay the holder or holders of the policy, in addition to the amount of the loss, 12 per cent. damages on the total amount of the loss determined by a court of competent jurisdiction and all reasonable

attorney's fees for the prosecution and collection of such loss. We find nothing in the statute to justify our limiting the imposition of the penalties to cases where insurance companies willfully refuse to pay what they owe. We doubt that the Legislature believed that insurance companies ever willfully or arbitrarily refuse to pay their losses; and we are quite sure the statute was not intended to fix a price or penalty that an insurance company should pay for the privilege of withholding money due to an assured until the end of an indefensible lawsuit.

The plaintiffs have prayed, in answer to the appeal, for damages for a frivolous appeal; but the ability and industry with which the appeal has been presented and prosecuted convince us that the learned counsel for the appellant were very much in earnest, and that the appeal was not taken merely to delay payment of the judgment.

The judgment appealed from is affirmed, at the cost of appellant.

(79 South. 219)

No. 21290.

VERNEUILLE v. STANN.

(June 29, 1918.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE §55, 90—MARRIED WOMAN'S PROPERTY—CONTRACTS—STATUTE.

Whilst it has not been the policy of the law of this state to permit married women to impoverish themselves, either through conjugal influence or inexperience, neither has it been such policy to permit them to enrich themselves at the expense of others, and if, prior to the time at which Act No. 94 of 1916 became a law, there was no express enactment authorizing or requiring them to return, in kind or value, money or property acquired under contracts which were void by reason of their incapacity to enter into them, such cases are proper ones for the application of so much of the Civil Code, art. 21, as declares that, "where there is no express law, the judge is bound to proceed and decide according to equity."

2. HUSBAND AND WIFE §62—SALE OF PROPERTY—JUDGMENT—CONCLUSIVENESS.

Where, without the authorization of her husband, who had deserted her and disappeared, or of the judge, a married woman, with young children, receives a loan of money, in the form of payments for a lot and for the erection thereon of a dwelling, the title to which property is placed in her name, in the hope that she may be able to pay for it from her earnings, and she occupies the same, without charge even for taxes, for many years, until, abandoning the idea of reimbursing the money so advanced, she approves of a suit upon the notes given by her for the same, in which (her husband being still absent and unaccounted for) she is authorized by the judge to appear, the judgment rendered in such suit will furnish full authority for the sale, under execution, of the property so acquired, and will be conclusive against her, her heirs, and the previous owners of the property, as to the validity of the title of the purchaser.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit on notes by Willis H. Verneuille against Mrs. Caroline Stann, wife of Philip Knight. Judgment for plaintiff by default, and certain real estate sold under writ of fieri facias to James E. Dunshie, and, from a judgment making absolute a rule to require him to accept title to the realty adjudicated to him at the public sale, Dunshie appeals. Affirmed.

Felix J. Dreyfous and Alfred D. Danziger, both of New Orleans (P. H. Stern, of New Orleans, of counsel), for appellant J. E. Dunshie. Legier & Gleason, of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. This matter is brought before the court by an appeal on behalf of James E. Dunshie from a judgment making absolute a rule requiring him to accept title to certain real estate, adjudicated to him at public sale, made by the sheriff in the execution of a writ of fieri facias issued under a judgment rendered in the above-entitled suit. The objections set up by defendant are:

That the property was purchased by the defendant (Mrs. Knight) without the author-

ization of her husband; that the notes upon which the judgment against her was obtained appear to have been signed by her without such authorization; that one of the notes was not due when the suit was instituted; that her husband was not cited; that, though the court authorized her to stand in judgment, the averments of the petition and the evidence adduced were insufficient to support such authorization; that a judgment rendered against a married woman, on void obligations, is void, and a sale made thereunder equally so.

It appears from the evidence that Mrs. Knight was married, in this city, in 1891, and thereafter gave birth to two children, issue of her marriage; that, in 1893, her husband disappeared and has not since been seen or heard of by his wife or those by whom he was here known; that he left his family in extreme poverty; that the plaintiff herein advanced \$1,100, which were used in the purchase, in her name, of the lot about which this controversy has arisen; that he subsequently paid out the further sum of \$4,808.02 for the erection thereon of a double tenement dwelling house and the repairing of the same; and that, for the amounts so advanced, Mrs. Knight, without being authorized by husband or court, gave the two notes upon which the judgment hereinabove mentioned was obtained—the original idea having been that she would thus be afforded an opportunity of providing shelter for herself and children and of reimbursing the money so advanced from her earnings. It further appears that since the house was built (more than 20 years ago) Mrs. Knight and her children have occupied one of the tenements; that the rental of the other has been devoted to the payment of interest on the money so advanced by plaintiff; that plaintiff has paid the taxes on the entire property; and that, in 1912, Mrs. Knight having abandoned the hope of being able to pay the notes which she

had given, the judgment in question was obtained upon them without objection from her and by default, after personal citation, however, and after she had been authorized by the court to stand in judgment upon allegation and proof of the disappearance and long-continued absence of her husband.

#### Opinion.

[1] It is true that, as a general rule, a married woman was incapable, under the law as it stood at the dates of the transactions out of which this litigation has arisen, of binding herself by contract, without the authorization of her husband, or, in case of his incapacity, absence or refusal to act, of the judge; but, if she actually borrowed money, or bought property, without such authorization, there was nothing in the law to prevent her from returning either the money or the property, provided she could do so without impairing her own estate. Proceedings to annul the acts of the wife for want of authority could, and can, be instituted only by the husband, or the wife, or by their heirs. C. C. art. 134. But, while it is not the policy of the law to permit married women to impoverish themselves, either through conjugal influence or inexperience, neither is it the policy of the law to permit them to enrich themselves at the expense of others, and if, prior to the time at which Act 94 of 1916 became a law, there was no express enactment authorizing, or requiring, them to return money or property acquired under contracts, void by reason of their incapacity to enter into them, such cases are proper ones for the application of so much of the Civil Code, art. 21, as declares that, "where there is no express law, the judge is bound to proceed and decide according to equity."

[2] Considering the question at issue from that point of view, if Mrs. Knight had purchased the property from plaintiff (with the improvements, subsequently placed there,



then on it) entirely on credit, and without being authorized by her husband or the judge, and had, thereafter, with the authorization of the judge, retroceded it to plaintiff for the unpaid price, we apprehend that neither husband nor heirs would have had any standing to attack such purchase or the retrocession, for it could not be said, in such case, that her purchase vested the title either in her or in the community, since she could bind neither for the price, and the authorization of the judge would have been sufficient to have enabled the parties to have cleared the title, by means of the retrocession, of the cloud placed upon it, and thereby have placed themselves in the positions occupied by them before the purchase. As the matter stands, the situation is not materially different. Instead of selling the property to Mrs. Knight, with the improvements on it, plaintiff advanced the money with which it was bought (in her name, from some one else, and the improvements added), and took her notes for the amounts advanced, and, after she had occupied one of the tenements, rent and tax free, for nearly 20 years, obtained a judgment in a suit, in which she was authorized by the court to appear and in which she interposed no opposition, in satisfaction whereof the property was sold to the appellant now before the court; the whole proceeding being merely an indirect method, whereby, without placing herself in any worse position than she was when the money was advanced she will be enabled to return it to the extent of the proceeds of the sale. Whether the allegations and proof of the absence of Mrs. Knight's husband were sufficient to justify the trial judge in authorizing her to defend the suit was a matter for him to determine, and which, we think, he determined correctly; and, it having been so determined, and she having been so authorized, we are further of opinion that the judgment rendered in that suit furnished authority for the sale here in question which is conclusive as

against Mrs. Knight, her husband and heirs, and all previous owners of the property sold. Counsel appear to be in error in alleging that one of the notes sued on was not due when the suit was filed (by reason of a supposed extension of time); but, even if they are not, that question cannot be raised now, since the judgment has long since become final and the delay for appeal has expired.

Judgment affirmed.

PROVOSTY and O'NEILL, JJ., concur in the decree.

(79 South. 221)

No. 21257.

BURTON-SWARTZ CYPRESS CO. v. BAKER-WAKEFIELD CYPRESS CO. et al.

(April 29, 1918. Rehearing Denied June 28, 1918.)

(*Syllabus by the Court.*)

TROVER AND CONVERSION  $\S$  16 — TIMBER CONVERTED INTO LUMBER — RIGHT OF ACTION.

One who has asked for and obtained a judicial sequestration of the lumber manufactured and to be manufactured by an adverse claimant of forest timber in dispute cannot, after the writ of sequestration has been finally dissolved and the timber has been converted into lumber, maintain an action against the adverse claimant for possession of the lumber, or, in the alternative, for its value, on the allegation merely that he had possession as owner of the timber, and without putting the title at issue.

Appeal from Twenty-Seventh Judicial District Court, Parish of Assumption; W. P. Martin, Judge.

Suit by the Burton-Swartz Cypress Company against the Baker-Wakefield Cypress Company and another. Judgment for defendants, and plaintiff appeals. Judgment annulled, and suit dismissed, reserving to plaintiff any right to renew the demand.

Pugh & Lemann, of Donaldsonville, and Beattie & Beattie, of Thibodaux, for appellant. Marks & Le Blanc and Howell & Wortham, all of Napoleonville, for appellees.

O'NIELL, J. This is the fourth time this litigation has been here in one form or another. It has always brought up only the question of possession of the N. W.  $\frac{1}{4}$  of section 54, township 12 south, range 15 east, and of the cypress timber thereon, or taken therefrom.

The controversy was commenced by an action for slander of title, instituted by one G. J. Labarre against the present plaintiff. The defendant here intervened in the suit, alleging that the intervener was in possession of the land, and that both the plaintiff, Labarre, and the defendant, Burton-Swartz Company, were slandering the intervener's title. The district court, finding that Labarre was not in possession of the land, dismissed his suit, and held that the petition of intervention fell with it. Labarre and the intervener appealed. Labarre and the Burton-Swartz Company then settled amicably the matter in contest between them, and moved to dismiss the appeal of the Baker-Wakefield Company, as well as that of Labarre, on the ground that the main suit was at an end. This court, taking a different view of the matter, maintained the intervener's appeal, annulled the judgment on the petition of intervention, and remanded the case to the district court for a decision of the contest between the intervener and the Burton-Swartz Company, as a separate action for slander of title. See *Labarre v. Burton-Swartz Cypress Co. (Baker-Wakefield Cypress Co., Intervener)* 126 La. 982, 53 South. 113.

The Burton-Swartz Company had pleaded in the district court, that the intervener, Baker-Wakefield Company, was not in possession of the land, and therefore had no right of action for slander of title. The district court, on the remand of the case, held that the Baker-Wakefield Company possessed and owned the land and timber. On appeal by the Burton-Swartz Company, this court held

that, as the Baker-Wakefield Company had, by the terms of its purchase of the property, no right to take possession of the land or timber without having paid certain notes representing a part of the purchase price, it could not maintain the action for slander of title. The judgment, therefore, was annulled, and the petition of intervention was dismissed. See *La Barre v. Burton-Swartz Cypress Co. (Baker-Wakefield Cypress Co. Intervener)* 130 La. 134, 57 South. 655.

While the suspensive appeal of the Burton-Swartz Company from the judgment rendered in favor of the Baker-Wakefield Company was pending, the appellee, claiming yet to have possession of the property, and having constructed a logging road over the land, notified the appellant that appellee intended to cut and remove the timber from the land unless prevented by injunction. The Burton-Swartz Company replied that the Baker-Wakefield Company would be held liable in damages if it should take away the timber in litigation. There being no attempt on the part of the Burton-Swartz Company to prevent the felling or taking of the timber, the Baker-Wakefield Company proceeded to fell, and remove it and manufacture it into lumber. Thereupon the Burton-Swartz Company filed a petition, alleging that the title to the timber was in contest in the suit pending on appeal, and praying that the court order a judicial sequestration, without bond, of all of the lumber, laths, and shingles manufactured and to be manufactured by the Baker-Wakefield Company from the timber in contest. The prayer of the petition was that the lumber, laths, and shingles be and remain sequestered until the final determination of the suit on appeal; and it was so ordered. In effect, therefore, the Burton-Swartz Company consented that the timber should be cut and converted into lumber by the Baker-Wakefield Company, on condition that the product should be judicially sequestered to protect

any judgment that might be rendered in favor of the Burton-Swartz Company on the appeal then pending. The sheriff sequestered the product as it was manufactured, from day to day, until the Baker-Wakefield Company had it released from seizure on a forthcoming bond. Thereafter, when the judgment was rendered on appeal and became final, the Baker-Wakefield Company moved to have the writ of sequestration dissolved on the ground that the judgment rendered on appeal had put an end to the sequestration, according to the terms on which it had been asked for and ordered. Judgment was rendered, dissolving the writ, and, on appeal, the judgment was affirmed. See *Labarre v. Burton-Swartz Cypress Co. (Baker-Wakefield Cypress Co. Intervener)*, 133 La. 854, 63 South. 380.

In the meantime, that is, while the appeal from the judgment dissolving the sequestration in the former suit was pending, the Burton-Swartz Company brought this suit against the Baker-Wakefield Company and H. L. Baker.

The plaintiff alleged that it owned and possessed the quarter section of land, and had held undisturbed, open, and notorious possession of the property, through its authors in title, for more than 50 years. The plaintiff alleged that the Baker-Wakefield Company had illegally gone upon the land, and as a trespasser, without color of right or title, had cut and taken the timber and converted it into lumber, amounting to 5,000,000 feet, worth \$150,000; that the defendant company had a part of the lumber in its custody and under its control, and that a large part of the lumber was in the custody of the court under sequestration. The plaintiff alleged that Henry L. Baker had conspired with the defendant company, had taken part in the removal of the timber, and was a joint tort-feasor, liable in solido with the company for \$10,000, damages for attorney's fees, as

well as for the lumber or its value. The prayer of the petition was that the plaintiff be decreed to be the possessor of all the lumber, shingles and laths made by the defendant company from the timber taken from the land; that all of said lumber be restored to plaintiff, subject to a credit for whatever lumber the plaintiff might recover in the sequestration suit then pending; and, in the event the lumber should not be restored to the plaintiff, that plaintiff have judgment against the defendants, in solido, for the value of the lumber, \$150,000, with legal interest; and, finally, for judgment against the defendants in solido for \$10,000 damages for attorney's fees.

It appears, therefore, from the prayer of the petition, that the object of the suit was to recover the possession or value of only the lumber that was manufactured by the defendant company from the timber taken after the lumber was released from sequestration on the forthcoming bond.

The defendants pleaded the exception of no cause of action; and, reserving the plea and answering the petition, admitted that the defendant company had taken the timber and converted it into lumber, but averred that it was done legally, openly, and in good faith. The defendants denied that the plaintiff had ever had possession of the land or timber, and averred, on the contrary, that the defendant company and its authors had had actual possession as owners of the land and timber, continuously, for 50 years. The defendants pleaded that the plaintiff, having consented that the timber should be cut and removed and manufactured into lumber by the defendant company on condition that the product should be sequestered, was thereby estopped from claiming possession of the lumber and from disputing the defendants' right to it. The defendants, considering the suit a possessory action, or considering the demand for the possession or value of the lumber to be

founded only upon the plaintiff's alleged possession of the land, refrained from putting the title at issue.

On the trial, the plaintiff attempted to prove title to the land, but, on the defendant's objection, the court ruled that the suit was a possessory action, and that the plaintiff's demand was founded solely upon its asserted possession, and admitted the title deeds in evidence for the purpose only of showing the extent and character of the asserted possession on the part of the plaintiff. Concluding, from the evidence, that the plaintiff had not had possession of the land or timber, the district judge gave judgment in favor of the defendants, rejecting the plaintiff's demand; and the latter has appealed.

#### Opinion.

The only reason for dismissing the action of the present defendant for slander of title, on the former appeal, was that the present defendant, then plaintiff in intervention, had not paid certain notes that represented a part of the purchase price of the land and timber, and therefore had no right to take possession of the timber. There was no such hindrance or objection when the defendant in this suit cut and removed the timber. Three years had then passed since the trial of the intervention in the suit of Labarre against the present plaintiff; and the defendant in this suit had then paid all of the purchase price of the land and timber. More than that, the plaintiff in this suit had, in the suit for slander of title, judicially consented that the timber should be taken by the defendant herein and manufactured into lumber, on condition that the lumber should be sequestered "until a final determination of the case on appeal";

i. e., until final determination of the suit for slander of title. The petition and order for a judicial sequestration implied the right of the defendant herein to release the property from seizure on a forthcoming bond; and the ultimate dissolution of the sequestration put an end to the obligation or bond.

The plaintiff's only remedy thereafter was to assert ownership of the land and timber put the title at issue, and, on that issue, demand the value of the timber taken by the defendant company.

This suit, being founded solely upon the plaintiff's allegation of possession, being therefore in the nature of a possessory action, and the proof being that the defendant, not the plaintiff, was in possession of the land and timber, should have been dismissed. But we think the court went too far in rejecting the plaintiff's demand finally and unreservedly. That judgment might prevent the plaintiff from renewing the demand for the value of the timber, in a petitory action, or on the assertion of title to the land and timber. We have concluded, therefore, to set aside the judgment and merely dismiss the plaintiff's suit, so as to reserve whatever right the plaintiff may have to renew the demand for the value of the timber, in a petitory action, or by asserting title to the land and timber.

The judgment appealed from is annulled, and the plaintiff's suit is dismissed, reserving whatever right the plaintiff may have to renew the demand in a petitory action or by asserting title to the land and timber.

The plaintiff is to pay the costs of the district court, and the defendant the costs of appeal.

LECHE, J., recused.

(79 South. 223)

No. 22951.

ST. JOHN LUMBER CO. v. FEDERAL NAT.  
BANK et al.(April 1, 1918. On the Merits, June 29,  
1918.)*(Syllabus by the Court.)*1. APPEAL AND ERROR  $\S$  663(2) — CERTIFI-  
CATE OF TRANSCRIPT — CONCLUSIVENESS OF  
EVIDENCE—DISMISSAL.

An appeal should not be dismissed on the mere allegation of the appellee that certain documents not in the transcript were introduced in evidence, if the clerk's certificate shows that the transcript is complete and there is no showing to the contrary.

2. APPEAL AND ERROR  $\S$  662(1)—TRANSCRIPT  
OF APPEAL IN ANOTHER CASE—CONSIDERA-  
TION.

The Supreme Court will not order that the transcript of appeal in one case be used or considered in another, on the allegation of one of the parties that the transcript desired to be so used or considered contains documents that were offered in evidence in the other case, if the allegation is contradicted and is not supported by the record of the proceedings had in the lower court.

On the Merits.

*(Additional Syllabus by Editorial Staff.)*3. MORTGAGES  $\S$  578—EXECUTORY PROCESS—  
APPEAL—ISSUES.

The only questions triable on an appeal from an order of executory process are those involving the regularity of the proceedings on their face.

4. JUDGMENT  $\S$  649—RES JUDICATA—APPEAL  
FROM ORDER OF EXECUTORY PROCESS—SUIT  
TO ANNUL MORTGAGE AND EXECUTORY PRO-  
CEEDINGS.

Judgment on an appeal from an order of executory process, disposed of on the face of the proceedings, is not res judicata in a suit to annul the mortgage and the executory process proceedings, depending upon evidence dehors the proceedings considered on such appeal.

5. MORTGAGES  $\S$  499—EXECUTORY PROCESS—  
DIRECT ATTACK.

A suit to annul a mortgage and to annul the executory process proceedings and sheriff's sale is a direct attack on the sale.

6. MORTGAGES  $\S$  499 — SALE ON EXECUTORY  
PROCESS—ANNULMENT—PARTIES.

A suit to annul a mortgage and the executory process proceedings and sheriff's sale cannot be maintained, in the absence of the parties to the sale, including the seizing creditor.

Appeal from Eighth Judicial District Court, Parish of Franklin; S. R. Holstein, Judge.

Suit by the St. John Lumber Company against the Federal National Bank, W. A. Brown, receiver, and others. Judgment for defendants, dismissing the suit, and plaintiff appeals. Motion to dismiss appeal overruled, and exception of no cause of action sustained, and the suit dismissed.

George Wesley Smith, of Rayville, for appellant. Stubbs, Theus, Grisham & Thompson, of Monroe, for appellees.

O'NIELL, J. This is an action to annul a sheriff's sale and to recover the property acquired by the Federal National Bank from the adjudicatees at the sale. The suit was dismissed on a plea of res judicata and exceptions of no cause of action and of non-joinder of an alleged necessary party. The plaintiff prosecutes the appeal.

[1, 2] The defendants move to dismiss the appeal, because the transcript does not contain a copy of the record in the executory proceedings in which the sale was made, entitled Colonial Trust Co., Trustee, v. St. John Lumber Co., 138 La. 1033, 71 South. 147, No. 20,829, and No. 21,467 of the docket of this court, which proceedings, particularly the decree rendered therein, are the basis of the pleas on which the present suit was dismissed. The defendants, appellees, pray, in the alternative, that is, if the appeal should not be dismissed, that the transcripts of appeal in the executory proceedings be considered as a part of the transcript in the present appeal.

In opposition to the appellees' motion, the attorney for appellant has filed an affidavit to the effect that the executory proceedings, entitled Colonial Trust Company, Trustee, v. St. John Lumber Company, were not annexed to the defendants' pleas or exceptions in the district court, nor offered in evidence

on the trial of the pleas or exceptions. Appellant contends, therefore, that the transcript of appeal in this case is complete, and that there is no reason for considering the transcripts of appeal in the executory proceedings as a part of the transcript in this case.

The motion to dismiss the appeal was filed after the expiration of the three days allowed for the filing of such motions, after the filing of the transcript of appeal. As far as the record discloses, however, the transcript is complete. It was alleged in the plea of *res judicata* that the entire record in the executory proceedings, including the decree rendered therein by the Supreme Court, was made part of the plea. But the record does not show that the executory proceedings were annexed to the plea; nor does the record show whether the executory proceedings were offered in evidence on the trial of the pleas or exceptions on which this suit was dismissed. If any of the proceedings had in this suit have been omitted from the transcript of appeal, and the appellees can show that the transcripts of appeal in the executory proceedings should be used and considered in the present appeal, the relief can be had under section 11 of rule 1 of the rules of this court (67 South. viii, 136 La. viii).

The motion to dismiss the appeal is overruled, reserving to the appellees the right to make application, under the rules of this court and on proper showing, for leave to have the transcripts of appeal in the cases No. 20,829 and No. 21,467, entitled *Colonial Trust Co., Trustee, v. St. John Lumber Co.*, used and considered as a part of the transcript in the present appeal.

#### On the Merits.

PROVOSTY, J. Plaintiff's property having been sold in the course of executory process proceedings in foreclosure of a mortgage

securing the payment of bonds, this suit is brought to annul the mortgage on the ground of fraud, and to annul the executory process proceedings and the sale on sundry grounds: That the debt had been fraudulently made to appear to be past due by including among the bonds sued on certain bonds which had been paid; that the sale was not preceded by appraisal and advertisement, and included property not embraced in the mortgage; and that the proceedings and the sale were but the culmination and consummation of a fraudulent scheme to despoil the plaintiff.

[3, 4] Defendant pleaded as *res judicata* of the issues thus raised a judgment rendered on an appeal taken from the order of executory process. *Colonial Trust Co. v. St. John Lumber Co.*, 138 La. 1033, 71 South. 147. This judgment could, of course, be *res judicata* only of those issues which plaintiff here, defendant and appellant there, could have raised on said appeal; and, as is well settled, the only questions triable on such an appeal are those involving the regularity of the proceedings on their face. Such an appeal is disposed of on the face of the proceedings; not on any evidence dehors their face. The said grounds of nullity alleged by plaintiff in this case depend upon evidence dehors the proceedings considered on said appeal, and some of them relate to matters occurring subsequently to said appeal. Therefore they could not possibly have been considered on said appeal; and, as a consequence, the judgment on said appeal cannot possibly be *res judicata* of them.

[5] Another exception to plaintiff's petition is on the ground that it attacks the said sheriff's sale collaterally. We cannot see anything collateral in the attack. It is as direct as direct could be.

[6] Next is an exception of no cause of action, based on the fact that the seizing creditor in the executory process has not been made a party to the suit. Defendant replies that this objection should have been urged by

means of an exception of want of proper parties, and that, not having been so pleaded, it cannot be considered. We do not agree with this. We do not see how a sale can be annulled in the absence of the parties to it; and the seizing creditor is one of the parties to a judicial sale. *Hyde v. Craddick*, 10 Rob. 393; *Suc'n of Ricard*, 27 La. Ann. 385; *Willis v. Wasey*, 42 La. Ann. 876, 8 South. 591, 879; *Blum v. Wyly*, 111 La. 1092, 36 South. 202; *Vinton Oil Co. v. Gray*, 135 La. 1049, 66 South. 357.

For the purpose of recasting, the judgment appealed from is set aside, and it is now ordered, adjudged, and decreed that the exceptions of *res judicata* and of the suit being a collateral attack are overruled; and that the exception of no cause of action, in so far as based on want of proper parties, be and the same is hereby sustained; and that the suit be, and it is hereby, dismissed at the cost of plaintiff. Defendant to pay the costs of appeal.

(79 South. 280)

No. 22640.

HAYNE et al. v. ASSESSOR et al.

NATALIE OIL CO. v. SAME.

(June 30, 1917. On Motion for Rehearing or to Correct Decree, Oct. 29, 1917. On Rehearing, Nov. 2, 1917. On the Merits, May 27, 1918.)

(Syllabus by the Court.)

On Motion to Dismiss Appeal.

1. APPEAL AND ERROR  $\S$  374(4) — APPEAL BONDS — EXEMPTIONS — CONSTRUCTION OF STATUTE—POLICE JURIES.

Under the Act No. 173 of 1902, providing that state, parish, and municipal boards or commissions exercising public power or administering public functions shall not be required to furnish bonds in judicial proceedings, police juries, even as boards of reviewers of assessments, are exempt from furnishing appeal bonds.

2. APPEAL AND ERROR  $\S$  641 — ERROR IN CLERK'S CERTIFICATE TO TRANSCRIPT—DISMISSAL OF APPEAL.

Under Code Prac. art. 898, an appeal should not be dismissed on account of an error in the clerk's certificate of correctness and completeness of the transcript, if it does not appear that

the error is imputable to the appellant; in such cases, reasonable time should be allowed to correct the error.

3. APPEAL AND ERROR  $\S$  656(1)—TRANSCRIPT OF APPEAL—DEFECTS—DISMISSAL.

Under the provisions of Act No. 229 of 1910, p. 388, when a transcript of appeal has been made as directed by the appellant or by both parties to the appeal, the appeal should not be dismissed on the ground that the transcript is defective; but either party, or the court, shall have the right to have any omitted part of the record filed as a supplemental transcript. There seems to be less reason for dismissing an appeal on account of a defect in a transcript, made without any instructions from the appellant, on the responsibility of the clerk of court.

On the Merits.

4. TAXATION  $\S$  331—RETURN—AFFIDAVIT — STATUTE.

The law requires that a return of property for assessment shall be verified by the affidavit of a person competent to take an oath, who shall, at least, believe the statements therein contained to be true, and shall sign the same in the presence of the assessor, or his deputy; and a return bearing the signature of a law firm, with the name of an individual underneath it, not written by the owner, but, by the clerk of the court, and the word "agents," added thereto, does not meet those requirements.

5. TAXATION  $\S$  462—FAILURE TO RETURN FOR ASSESSMENT—ESTOPPEL.

The property owner who fails to make the return of his property for assessment, in the manner and within the time required by law, is estopped to contest the correctness of the assessment as made by assessor, or by the assessor in concurrence with the board of review.

6. HIGHWAYS  $\S$  125—ROAD TAX—POWER OF POLICE JURY—STATUTE.

A police jury, with the approval of a majority in number and values of the property taxpayers, obtained in the manner provided by law, may impose a parish tax of five mills, for five years, for road purposes, but has no power, even with the approval of such majority, to impose another such tax, for the same purpose upon the property in particular wards of the parish called a road district.

7. TAXATION  $\S$  301(7)—IRREGULARITY — ESTOPPEL.

The fact that a property owner has, for several years, paid a tax unlawfully imposed, does not necessarily estop him to deny its legality and refuse to continue such payments.

(Additional Syllabus by Editorial Staff.)

8. TAXATION  $\S$  499 — FEES OF ATTORNEY — DISTRICT ATTORNEY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Act No. 170 of 1898, § 56, providing that the attorney at law who represents the tax

collector in all proceedings for the reduction of assessments and collections of taxes shall receive 10 per cent. on the amount collected, to be paid by the party against whom the judgment is rendered in whole or in part, and to be collected by the tax collector, as costs, when the taxes and other penalties are collected, and in view of Const. art. 125, providing that the district attorney shall receive a fixed annual salary and shall "also receive fees," and article 180, providing that no officer whose salary is fixed by the Constitution shall receive any fees, except where otherwise provided by Constitution, and Act No. 125 of 1912, providing for the necessary expenses of police juries, the allowance of a fee under section 56, though the attorney was the district attorney, was proper.

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

Suits by W. P. Hayne and others and by the Natalie Oil Company against the Police Jury of Red River Parish as a board of review, and against the Assessor and Tax Collector, to have the assessments of plaintiffs' property canceled, or, in the alternative, reduced. Cases consolidated before trial, and judgment rejecting the demands of plaintiffs W. P. Haynes and others in respect to a land tax, and decreeing the nullity of a road tax, and plaintiffs W. P. Haynes and others and the defendants appeal; the Natalie Oil Company being before the court as an appellee. Judgment affirmed.

Nettles & O'Quin, of Coushatta, for plaintiff Natalie Oil Co. J. F. Stephens, Dist. Atty., and S. R. Thomas, both of Coushatta, for defendants.

#### On Motion to Dismiss Appeal.

O'NIELL, J. Two suits were brought against the police jury, as a board of reviewers, and against the assessor and the tax collector, to have the assessments of the plaintiffs' property declared illegal and ordered canceled, or, in the alternative, to have the assessments reduced. The cases, being identical as to the issues involved, were consolidated before the trial. The judgment, in each case, decreed the assessment valid, and

condemned the plaintiff or plaintiffs to pay 10 per cent. thereof, as attorneys' fees, except as to a certain road tax, which was decreed unconstitutional. Orders of appeal, returnable to this court, were granted to all parties, when the motions for new trial were overruled. Thereafter the appeal of the Natalie Oil Company, plaintiff in one of the cases, was, on motion of counsel for the company, made returnable to the Court of Appeal. That case, therefore, is before us only on the appeal of the defendants from the judgment decreeing the road tax unconstitutional. And in that case the plaintiff, appellee, has filed a motion to dismiss the appeal, on the following grounds, viz.: (1) That the appellants have not furnished an appeal bond; (2) that the clerk's certificate of correctness and completeness of the transcript is not a sufficient or proper certificate; and (3) that the transcript is not complete.

#### Opinion.

[1] In a very recent decision, in Police Jury of La Salle Parish v. Police Jury of Catahoula Parish, 144 La. —, 80 South. —, it was held that, under the Act No. 173 of 1902, providing that state, parish, and municipal boards or commissions exercising public power or administering public functions shall not be required to furnish bonds in judicial proceedings, police juries are exempt from the furnishing of appeal bonds. The appeal in this case is prosecuted by and on behalf of the police jury and the appellants were therefore not required to give appeal bonds.

[2] The clerk's certificate of correctness and completeness of the transcript is somewhat irregular. It recites that the transcript contains all of the pleadings, all of the oral evidence taken, and the proceedings of the police jury relative to road district No. 2, offered by defendants, being all the evidence ordered put into the transcript, also a true extract from the minutes, etc., and concludes with the expression, "as shown on the record



in this office." The certificate should recite, not that the transcript contains all of the original pleadings, etc., but that it contains true and correct copies, or that it is a true and correct transcript or copy, etc. The expression, "true and correct extract from the minutes" is a palpable error, intended for "true and correct abstract of the minutes." Article 898, C. P., however, provides that an appeal shall not be dismissed on account of any defect, error, or irregularity in the certificate of the clerk, unless it appears that such defect, error, or irregularity is imputable to the appellant, but that, in all such cases, the court shall grant a reasonable time to correct such errors or irregularities, unless they be waived by the appellee. There is no indication that the defects, errors, or irregularities in this certificate are imputable to the appellant. As the case cannot be heard until the next term of court, no harm or delay can result from our granting a reasonable time to the appellant to have the errors corrected.

[3] The third complaint, in particular, is that copies of two documents introduced in evidence by the plaintiff, being copies of the proceedings of the police jury promulgating the result of two special elections purporting to authorize the levy of two separate road taxes, were omitted from the transcript. Act No. 229 of 1910, p. 388, provides that, when a transcript is made as directed by the appellant, or by both parties to the appeal, the appeal shall not be dismissed on the ground that it is defective, but the parties or the court shall have the right to have the omitted part of the record filed as a supplemental transcript. It is contended by the learned counsel for the appellee that the appellants did not file with the clerk of the district court a written list of the portions of the record to constitute the transcript of appeal, as permitted by the statute, and that therefore they are not entitled to the benefit of the act. There is no such list in the record, but the clerk's certificate indicates that one was filed by

the appellants. We refer to the concluding expression in the certificate, after the recital that the transcript contains all the evidence that the clerk was ordered to put into it, "as shown on the record in this office." In their brief, the learned counsel for the appellee say that it appears that it was by the appellants' orders that only certain portions of the documentary evidence were embodied in the transcript, and that the transcript was compiled under the direction of the appellants. At any rate, there would seem to be better reason for our refusing to dismiss an appeal on account of a defect in a transcript made by the clerk on his own responsibility and without instructions from the appellant than there would be if the transcript had been made as directed by the appellant, under Act No. 229 of 1910. Our conclusion is that either party to this appeal should have the right to file, within the time that shall be allowed for correcting the errors or irregularities in the clerk's certificate, any omitted portions of the record, as a supplemental transcript.

The motion to dismiss the appeal is overruled, the appellant is allowed 30 days in which to have the errors or irregularities in the clerk's certificate corrected, during which time, either party hereto shall have the right to file any omitted portion of the record as a supplemental transcript.

On Motion for a Rehearing or to Correct the Decree.

PER CURIAM. The appellant has failed to have the errors in the certificate of the clerk of the district court corrected, and has failed to supply the omitted portions of the record within the 30 days allowed in the order of this court overruling the appellee's motion to dismiss the appeal. The appeal is therefore dismissed.

On Rehearing.

PER CURIAM. In entering our last order in these consolidated cases the court over-

looked the supplemental record which had been filed July 30, 1917, and erroneously ordered the cause to be dismissed.

It is now ordered that the order dismissing the appeal in these cases be recalled and annulled, and the motion to reconsider our former decree herein be denied. Rehearing refused.

#### On the Merits.

MONROE, C. J. Plaintiffs brought suits to annul, or, as the case may be, reduce, the assessments upon certain land owned by them in the parish of Red River, and to have declared unconstitutional and void a tax levied by the police jury for road building upon the property in wards 4, 5, and 6 of that parish. As the cases involved similar facts and identical questions of law, they were consolidated and tried together, but thereafter, as we are informed through the briefs of counsel, the Natalie Oil Company made a settlement with regard to the tax first above mentioned, and there was judgment rejecting the demands of the other plaintiffs in respect to that tax, but decreeing the nullity of the road tax, from which judgment W. P. Haynes et al. and the defendants have appealed, and the oil company is before the court as an appellee.

Confining our attention for the moment to the tax first mentioned, the case of Haynes et al., as disclosed by the evidence in the record, is as follows:

They own 582 acres of land in the parish of Red River, upon which, during the year 1915, many wells were drilled, and began producing oil during that year, probably in the summer, and during the year 1916 produced 161,000 barrels of that mineral, which on January 1st was worth \$1.05 per barrel, so that the output for the year at that rate would have been worth \$169,050.

Some of the wells were operated by plaintiffs and others, constituting a majority, by leasing companies in the output of which plaintiffs were interested to the extent of about 50 per cent. At some time prior to

April 1, 1916, a law firm which had, for some years, represented W. P. Haynes, who, in turn, represented his co-owners and coplaintiffs, as agent in matters of assessment, made the following return of the land in question, for the assessment of that year, to wit:

Land.	Number of Acres.	Average Value per Acre.	Total Value.
Timber, where lands are owned by another.			
Class C.....	200	2	\$ 400
Cotton Class A.....	100	10	1,000
Cotton Class B.....	242	5	1,210
Cotton Class C.....	40	3	120
Total assessment .....			\$2,730

(The legend "Timber, where lands," etc., we take to have been left upon the return as found upon the form that was used, as it is not here disputed that plaintiffs owned the 582 acres so returned.)

Following the above is a description of the lands there mentioned, by governmental subdivisions, and after that, the legends:

Consolidated Agricultural Statistics.	
Number of Acres.	
Uncultivated .....	200
Cultivated .....	382
Total .....	582

To all of which there is attached the form of affidavit prescribed by section 15 of Act 170 of 1898, followed by what purport to be the signatures "Nettles & O'Quin, L. O'Quin, Agents" and the formula "sworn and subscribed," etc., signed by the clerk of the court.

The allegations of complaint with respect to the first-mentioned tax are that plaintiffs made a return of their land for assessment and that the same was accepted by the assessor; that the assessor gave notice that the listing and valuation of property had been completed, and that the rolls were open to inspection; that plaintiffs' agent visited his office and found his valuation unchanged; that, on June 5th, the police jury met as a board of review, and the valuation of plaintiffs' property remained unchanged at that time; that the board adjourned without action and indef-

nately; that on July 11th the board, contrary to the provisions of article 48 of the Constitution of 1913, and without any kind of notice to petitioners, attempted to reconvene for the consideration of assessments; that just prior to "its said meeting" petitioners' agents learned of the intention and attended the "would-be meeting," thereby discovering that the lists, for the first time, showed an assessment of "48,403 bbls. of oil, at 60 cents per bbl.," of a total valuation of \$29,041; that petitioners had no notice of "the increase" in the valuation of their estate, and were deprived of a hearing before the assessor; that they protested, without avail, that they were taken by surprise; that the assessor was without authority to place any additional valuation upon petitioners' property after their return had been accepted and placed on the list, the lists advertised as completed, and the "board had held its meeting on June 5th, as required by law; that the board of review was without authority to act as such after the first Monday in June, or to increase petitioners' assessment without proper notice; that they are informed that the estimate of 48,403 barrels of oil was made by some one in the employ of the police jury, who was unauthorized so to do, and was placed on the list by the police jury; that they anticipate that the assessor will add said estimated amount to the assessed valuation of their lands; that said assessment is void for the further reason that the oil is not reduced to possession, and is not property within the meaning of the law; for the further reason that the supposed valuation which equals said sum was not in existence on January 1, 1916, or at any other time prior to the completion of the assessment rolls; and for the further reason that petitioners do not own the oil and gas beneath the land, but have leased the rights to explore therefor to various companies, and that the lessees become the owners of such of those minerals as may be found; that there is no

law authorizing the assessment of oil and gas not reduced to possession; that the attempt of the assessor and the board operates as an attempt to levy a tax on petitioners' income; that in the alternative the estimate of the oil greatly exceeds the amount produced on petitioners' land and greatly exceeds the value of the same; that "the valuation of property in Red River parish never exceeds 25 per cent. of the actual valuation, for any purposes whatever"; that the board of equalization has directed the assessor "to determine the daily production of the oil properties and place a valuation upon the daily production of \$40 per barrel." By an amendatory petition, it alleged that petitioners have not leased all of their oil-producing land, but are operating some of it themselves.

There is a wide variance between the allegations of the petition and the facts as disclosed by the record; but, as we have concluded, for reasons to be stated, that plaintiffs have no standing to contest the correctness of the assessment as concurred in by the assessor and the board of review, we find it unnecessary to enter upon that subject, save to say that the main question presented for decision is, not whether there has been an assessment of oil, which had been omitted from the roll as originally completed, but whether the assessment of plaintiffs' land as entered upon the original roll should be increased. Dealing with that question, we find that there has been no assessment of oil. The assessor no doubt realized that, to accept plaintiffs' return as the basis of his assessment, and appraise, as available for agricultural purposes, only, at \$2,730 lands, the mineral output of which, inuring to the owner, he believed to be of large value, would be to perpetrate a fraud upon the state, and he, therefore, delayed the completion of his rolls until he could ascertain the exact extent, and at least proximate value, of that output, and upon that basis, add to the agricultural value of

the land, as returned by plaintiffs, its mineral value, as predicated upon its mineral output; and it was only to that end, and as showing the basis for the increased assessment of the land, that the oil was mentioned on the roll.

[4] Our reasons for the conclusion that plaintiffs have no standing to contest the correctness of the assessment list filed by the assessor are, briefly, that the return upon which they rely was not verified as required by law. Act 182 of 1906, § 3, pp. 332, 333, declares:

"That it shall be the duty of each taxpayer \* \* \* to fill out a list of his property and make oath to its correctness, in the manner and form prescribed by existing laws, and return the same to the assessor on or before the first day of April of each year, in default of which, for any cause whatever, he shall be estopped from contesting the correctness of the assessment list filed by the assessor."

The form and manner of the return are prescribed by section 15 of Act 170 of 1898, p. 354, which provides a form of oath to be taken and subscribed by the taxpayer. Section 18, p. 356, of the same act declares:

"That each tax assessor, in person or by duly qualified deputy, is hereby authorized to administer the oath or affirmation, attached to the said list, in the manner required by law for administering oaths; and is required, in person, or by deputy, to actually administer the said oath or affirmation orally to the person signing same; and should any tax assessor or deputy sign such jurat without having actually administered said oath, he shall be guilty of nonfeasance and malfeasance in office, under article 217 of the Constitution, and the tax assessor shall be liable on his bond for all the taxes due by the person purporting to have taken said oath or affirmation, and shall forfeit all his commissions and shall be at once removed from office by the Governor. And, further, that any willful misstatement to the assessor, or any authorized deputy, made under oath, shall be considered and punished as perjury, as provided by the laws of this state in other cases."

The form of oath and jurat, as attached to the return made on behalf of plaintiffs, reads (in part):

"I, whose post office, is \* \* \* do solemnly swear that the list on this paper which I have signed, is a correct and complete list of all the

property of which I am owner, or have in my possession or control, in capacity set forth in said list, \* \* \* that the number of acres of land has been stated, and that the valuation placed thereon by me is true and correct, to the best of my knowledge and judgment and I have given the proper description of said lands and all other taxable property as the law requires so help me God.

"[Signed] Nettles & O'Quin.

"L. O. O'Quin, Agents.

"Sworn to and subscribed before me this 28th day of March A. D. 1916.

"[Signed] J. W. Ogleshorpe, Clerk D. C."

The heading upon the face of the return reads:

"Assessment List of W. L. Hayne Estate.

"Mr. White, W. L. Hayne Estate, Parish of ———.

"Post Office W. P. Hayne, Mgr.

"Boyce, La."

The law firm of Nettles & O'Quin appears here as representing the plaintiff, but neither the name of the firm nor the names of its members appear on the list, or return, to answer the call of the oath, reading, "of which I am owner or have in my possession or control, in capacity set forth in said list," so that it does not appear from the oath that Nettles & O'Quin, or L. O. O'Quin, or either of them is the owner of the land, or the agent of the owners, or that they have any connection with the land, or that there was any reason why the owner or some one representing the owner should not have made the return. Moreover, there can be no such thing as an affidavit by a law firm, and the owner of the name "L. O. O'Quin," which appears below that of the firm of "Nettles & O'Quin," testifies that it was put there, not by him, but, by the clerk of the court. Again, it will be observed that the oath is framed in the first person singular, and yet purports to be signed by a law firm and an individual, who upon the face of the affidavit is not shown to be a member of the firm, and that, following the names, appears the title "agents," which was evidently attached to the firm signature, before that of the indi-

vidual affidavit was added by the clerk. On the subject of the use of the firm name and the addition of his own, Mr. O'Quin, who is shown to be a lawyer and notary, and, with Mr. Nettles, to have represented the plaintiff, Hayne, in assessment matters, for, as we infer, several years, testifies as follows:

"Q. (By counsel for plaintiffs). Mr. O'Quin, did you swear to the return as made by the estate of W. P. Hayne, before J. W. Oglethorpe, clerk of the court and ex officio notary public? (Objection overruled.) A. It is signed; the affidavit appears to be signed, 'Nettles & O'Quin,' and I recall at the time that I swore to it before J. W. Oglethorpe, and he called my attention to it, and you will notice that he wrote my name up there on the affidavit. I personally swore to that return before J. W. Oglethorpe."

But the law requires the assessor, or his deputy, to actually administer the oath or affirmation orally "to the person signing the same," and makes no provision for the taking of the oath before any other officer than the assessor or for the penalizing of any other officer for misfeasance or nonfeasance in that connection, or for the administering of the oath to a person who does not, or a firm which cannot, take it, and sign his, or its, name as evidence of having done so. Finally Mr. O'Quin testifies that he was not at all familiar with the property of "Mr. Hayne, the plaintiff," or its value; that he knew in January 1916, that it was producing oil in 1915, but that he returned only its agricultural value, and the petition alleges "that the valuation of property in the parish of Red River never exceeds 25 per cent. of the actual valuation for any purposes whatever," his testimony upon that point reading (in part) as follows:

"Q. But, you only gave in, as the assessment, its agricultural value? A. That was the assessment. Q. You knew that would not be accepted? A. I was not a clairvoyant. \* \* \* Q. You did not think it would be? A. I was going to do my very best to make them accept it; that is what I am trying now. Q. That was your first stall, as a preliminary to the suit that you have now brought? A. Well, the law has made that a prerequisite."

[5] The law, as we understand it, has made it a prerequisite to the bringing of a suit of this character that a return shall be made to the assessor prior to April 1st of each year by the owner of the property to be assessed, or some one capable of taking an oath, and shown upon the face of the return to be authorized to represent the owner, or to have the property in his possession or under his control or to have an interest in paying, or to be under some obligation to pay the tax or to be the representative of such person, which return must be verified by the oath of the person making it, administered by the assessor, or his deputy, and signed by the affiant in the presence of one or the other of those officers; and the person making such return must at least believe that the statements therein contained and sworn to are true. And as the return herein relied on by plaintiffs was lacking in several of those essentials, we hold that it was insufficient in law, and that plaintiffs are therefore estopped to contest the return of the assessor, which they here attack.

[8] Act 170 of 1898, § 56, p. 373, declares:

"That the attorney at law who represents the tax collector \* \* \* in all proceedings for the reduction of assessments and collection of taxes (license taxes excepted), \* \* \* shall receive a compensation of ten per cent. on the amount collected, calculating same upon the aggregate amounts of taxes and penalties so collected as the result of aforesaid proceedings. The aforesaid commission to the attorney at law shall be paid by the party against whom the judgment is rendered in whole or in part, and shall be collected by the tax collector as costs, at the same time that the taxes and other penalties are collected."

It is said that the allowance by the court a qua of the fee thus provided for was "manifest error," for the reasons, as alleged, that the district attorney, together with a special attorney employed by the police jury, represented the defendants in this case; whereas the law implies that the compensation is to be allowed only to the attorney appointed by the Governor to assist the tax collector; that

no attorney representing the tax collector appeared in the case; and that the district attorney, who represented the defendants herein, is only allowed such fees and penalties as are prescribed by law. The implication from the statute quoted, as we understand it, is that the compensation is to be allowed for the benefit of any attorney at law who successfully represents the interests of the state in any proceeding for the collection of a tax or the cancellation or reduction of an assessment which obstructs and delays such collection. In this case the pleadings filed on behalf of defendants bear the signatures of J. F. Stephens and S. R. Thomas, as attorneys, and they both participated in the trial in the district court, and have both signed the brief for defendants in this court. Mr. Stephens, it is true, appears as district attorney, but article 125 of the Constitution, which declares that the district attorney shall receive a salary of \$1,000 a year, further declares that "he shall also receive fees," provided that no fee shall be allowed in a criminal case, except on conviction, and then not to exceed \$5. It therefore provides the exception to the rule, as contemplated by article 180, in declaring that no officer whose salary is fixed by the Constitution shall be allowed any fees or perquisites of office, "except where otherwise provided for by this Constitution."

Act 125 of 1912 was intended, as it appears to us, to prevent police juries and other state agencies from incurring obligations to district attorneys for services which those officers are required to render without other compensation from their official clients than their salaries; but, as the Constitution declares that they "shall also receive fees," and, as Act 170 of 1898 declares, in effect, that a fee shall be taxed as costs for the benefit of the attorney at law who successfully represents the state in a suit which delays the collection of a tax, we are of opinion that

the fee thus accruing to the attorney at law, whether he be the district attorney or another, is not within the meaning of that statute.

[8] The case, as presented, concerning the road tax, may be stated as follows:

On June 17, 1917, elections were held to take the sense of the qualified voters upon the question of voting a 5-mill tax, for five years, in aid of the building of roads throughout the parish, and upon the same day, a similar election was held in road district No. 2, composed of wards 4, 5, and 6, to take the sense of the voters in that territory upon the question of voting a similar tax, for a like period, for the building of roads and bridges therein.

Plaintiffs object to the tax as levied in road district No. 2, on the ground that it, and the parish tax, levied on the same day, taken together, exceed, by 5 mills, a constitutional limitation; and that the road district tax must therefore be decreed null. Neither the power of the police jury to create a road district of the entire parish, and subroad district of different wards, nor the regularity in the proceeding whereby that was done, and the election ordered, held, and returned, is called in question, the contention being that the two taxes together amount to 10 mills, and that 5 mills was the maximum limit then allowed by article 291 of the Constitution of 1898. Counsel for plaintiff seem to think that authority for the 10-mill levy might be found in the Constitution of 1913, but they allege that:

"The attempt on the part of the constitutional convention of 1913 to alter and amend the provisions of the article 291 of the Constitution of 1898 and extend the powers of parochial and municipal corporations was ultra vires and beyond the authority granted that convention by Act 1 of 1913, and the said extension void."

It is admitted that plaintiffs, including the Natalie Oil Company, paid the tax in dispute for the years 1913, 1914, and 1915, without protest of any kind, and defendants set up

that acquiescence as a ground for an equitable estoppel.

Article 291 of the Constitution of 1898 as originally adopted authorized police juries to form their parishes into road districts, and, in order to raise funds for road and bridge purposes, to set aside at least 1 mill per annum of the taxes levied by them, to impose a per capita tax, and to levy a license tax on vehicles.

The second paragraph of the article reads:

"To carry into effect the provisions of this article the police juries may enact such ordinances of a civil nature as may be necessary to enforce the property license tax, and, of a criminal nature, to enforce the per capita tax. Other taxes may be levied by the police juries for road and bridge purposes, not to exceed five mills for five years on the property of the parish, or any ward thereof, where the rate of taxation and the purpose of the tax shall have been submitted to the property taxpayers of said ward or parish \* \* \* and a majority in number and value of those voting shall have voted in favor thereof."

By an amendment to the Constitution, though not particularly directed to article 291, adopted in 1910 (Act 14 of 1910), a special state tax of one-fourth of a mill was levied for the creation of a road fund, the same to be considered part of the 6-mill state tax already authorized.

At the general election of November 5, 1912, article 291 was amended, pursuant to Act 236 of 1912, by dividing paragraph No. 2, as in the Constitution, into two paragraphs, and adding a sentence, as the second in order, to the paragraph 3, thus created so that in the amendment paragraphs 2 and 3 read:

"(2) To carry into effect the provisions of this article the police juries may enact such ordinances of a civil nature as may be necessary to enforce the property and license tax, and of a criminal nature, to enforce the per capita tax.

"(3) Police juries and municipal corporations \* \* \* may levy other taxes for the construction and maintenance of public roads and bridges within the territorial limits of said parishes, and may incur debt, and issue bonds therefor, in the manner and to the extent authorized under provisions of articles 232 and

281 of the Constitution and the statutes adopted to carry them into effect. Other taxes may be levied by the police juries for road and bridge purposes not to exceed five mills for five years on the property of the parish, or any ward thereof, whether [whenever] the rate of taxation and the purpose thereof shall have been submitted to the property taxpayers of the said ward, or parish, entitled to vote \* \* \*, and a majority of those voting at said election shall have voted in favor thereof. That this article shall be self-operative."

The act of 1913 (No. 1, Extra Sess.) ordered an election to take the sense of the electors upon the question of holding a constitutional convention in accordance with the proposition therein contained; that is to say, to quote the language, "for the following purposes and upon the following terms and conditions, to wit," and among the conditions imposed was a prohibition against the adoption of any constitutional provision inconsistent with those of the then existing Constitution, except such as might relate to the bonded debt of the state, of \$11,108,300 and to the sewerage and water board of New Orleans, and a withholding, in specific terms, of the power to change the then existing laws relating to, or in any manner affecting, parochial or municipal corporations.

It has been held by this court that the proposal contained in the act in question, having been submitted to and adopted by the people of the state in accordance with its terms, operated as a mandate to the convention whereby its power was regulated and determined (*State v. Am. Sugar Ref. Co.*, 137 La. 407, 68 South. 742; *Foley v. Dem. Par. Committee*, 138 La. 220, 70 South. 104), so that, if there have been incorporated in the Constitution of 1913 any provisions which are inconsistent with those of article 291 of the Constitution of 1898, they are of no effect. Mr. W. O. Hart, who was a prominent member of the convention of 1913, in a brochure entitled "Comparison of the Constitutions of 1898 and 1913," etc., makes the following statement as to the action taken by

the convention in regard to that article, to wit:

"Articles 291 and 292 consolidated as article 292 in the Constitution of 1913. Article 291 amended to conform to constitutional amendment adopted November 5, 1912 (Act No. 236 of 1912), and the second sentence of the third paragraph [as in the amendment] omitted because conflicting with the first sentence thereof."

But, though the limitation of the taxing power, as conferred by the second sentence, thus omitted, were in conflict, in all respects, with the grant which, by the reference to articles 232 and 281, is contained in the first sentence, the fact remains that to so decide, and to omit (or strike out) the second sentence, would be to make an important change in, and adopt a provision inconsistent with those of, the then existing Constitution, and affecting parochial and municipal corporations, by abrogating the restrictions, imposed by the omitted section, upon their powers of taxation, which action was not within the specifically delegated authority of the convention by which it was taken, but, to the contrary, was specifically excluded therefrom. The two sentences do not, however, in all respects, if at all, conflict with each other. The first contains a general grant of power to levy special taxes for the construction and maintenance of roads and bridges, and then, following a comma, the sentence proceeds:

"And may incur debt and issue bonds therefor, in the manner and to extend [sic] authorized under provisions of articles 232 and 281 of the Constitution and the statutes adopted to carry them into effect."

The reference to the two articles is therefore directed to the manner and extent in and to which debt may be contracted and bonds issued, and not to the rate of taxation. Turning to article 281 (since article 232 has little or no bearing upon the question at issue), we find that, as amended and re-enacted in accordance with Act 197 of 1910, it confers upon municipal corporations (city of New Orleans excepted), parishes, school, drainage,

subdrainage, road, navigation, or sewerage districts, when authorized by a majority in number and amount of the property tax payers, and for the purposes of a variety of specified works of public improvement (including roads and bridges), the title to which must vest in the public, the power to incur debt, levy special taxes, not to exceed 10 mills on the dollar, issue negotiable bonds, to mature in not more than 40 years, bear interest at not more than 5 per cent., be sold at not less than par, and not to exceed, in the aggregate and for all purposes, 10 per cent. of the assessed value of the property of the subdivision issuing them. Article 291 is found, in the Constitution of 1898, under the title "Public Roads," and deals with no other subject than the power of police juries to incur debt, levy taxes, and issue bonds for the construction and maintenance of roads and bridges. As originally adopted the article authorized police juries, with the consent of the property tax payers, to levy special taxes, not to exceed 5 mills for 5 years, for road and bridge purposes, but conferred no authority to incur debt or issue bonds, and the evident purpose of its amendment and re-adoption, pursuant to Act 236 of 1912, was to supply that omission. Finding, apparently, that the restrictions imposed upon the exercise of such authority by articles 232 and 281 were sufficient for the cases specified in those articles, the General Assembly, in proposing, and the people of the state, in adopting, the amendment to the article 291, included those restrictions merely by reference to the articles in which they were contained, as appears from the first sentence of paragraph 3 of the amended article. But the General Assembly did not propose, nor did the people adopt, any change in the rate of special taxation for road and bridge purposes. To the contrary, the question of incurring debt and issuing bonds having been disposed of, as above stated, in one sentence, the following sentence



was devoted to the question of the rate of taxation, to be allowed for the construction and maintenance of roads and bridges, as contradistinguished from that allowed by article 281 for those purposes and also for such purposes as the "purchasing or constructing of systems of waterworks, sewerage, drainage, navigation, lights, public parks and buildings, with all necessary equipments and furnishing," and the conclusion reached was that, while a 10-mill tax, running 40 years, or more, might be needed for other improvements, such as those mentioned, a 5-mill tax for 5 years was all that was required for road and bridge purposes; and so the second sentence of the third paragraph of article 291, as amended, reads (in part):

"Other taxes may be levied by the police juries, for road and bridge purposes, not to exceed five mills for five years on the property of the parish, or any ward thereof. \* \* \* That this article shall be self operative."

We conclude, then, that the 10-mill rate of taxation, established for road and bridge purposes by article 281, as amended pursuant to Act 197 of 1910, was superseded by the 5-mill rate, re-established by article 291, as amended pursuant to Act 236 of 1912. We therefore concur with the judge a quo in the opinion that the road tax in question is unconstitutional, and that plaintiffs cannot be compelled to continue its payment.

[7] It is said that the plea of estoppel, based on the payments heretofore made by plaintiffs and the fact that such acquiescence has led the police jury to incur obligations which it may find difficulty in discharging, should be sustained, and we think it entitled to consideration, but we do not see our way to its maintenance. "An acknowledgment," it has been said by this court, "can never be invoked to maintain a condition or state of things created in violation of a prohibitory law." *Insurance Co. v. Harbor Protection Co.*, 37 La. Ann. 236; *Succession of Jacobs*,

104 La. 453, 29 South. 241. We are confronted also with Act 219 of 1914, p. 416, which declares:

"That the plea of estoppel shall never be allowed by the courts of this state in matters of local or municipal assessments where there are radical defects in the proceedings leading up to such local assessments," etc.

To which we add that plaintiffs' counsel have filed in this court a plea of *res judicata*, which, whether good or bad, is accompanied by certified records, showing that at the suit of several taxpayers, and rather large ones, as we imagine, this particular tax was declared null, more than a year ago, by a judgment from which no appeal appears to have been taken, so that, if the tax should now be sustained, we should bring about the undesirable situation of compelling some members of a community to pay a tax, whilst others, similarly situated, have obtained exemption. We find no error in the judgment appealed from, and it is

Affirmed.

(79 South. 287)

No. 22959.

COCO, Atty. Gen., v. ODEN, Sheriff.

(April 29, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

1. CARRIERS  $\S$ 13(1) — TELEGRAPHS AND TELEPHONES  $\S$ 33( $\frac{1}{2}$ ) — DISCRIMINATORY RATES—FREE PASSES.

It is against the public policy and the law of the state for public officers to accept or receive free passes, or discriminatory rates, from passenger, telegraph, and telephone companies.

2. CARRIERS  $\S$ 13(1)—"FREE PASS."

A "free pass," or discrimination in rates, is one for which a full consideration is not given, and the transportation paid for in the usual way, at the usual time and at tariff rates; it "means the privilege of riding over a railroad without payment of the customary fare" (quoting Words and Phrases, Free Pass).

3. CONTRACTS  $\S$ 125—VALIDITY.

A contract between a sheriff and a railroad corporation to perform legal services in suits

where the company is a party in exchange for a free pass is contrary to morals, the law, and the public policy of the state, and it is null and void.

4. SHERIFFS AND CONSTABLES  $\Leftrightarrow$  6—SUIT FOR FORFEITURE OF OFFICE—PARTY PLAINTIFF.

A suit against a sheriff for forfeiture of his office because he accepted, received, and used a free pass or free transportation, or accepted discriminatory passenger rates, is properly brought by the Attorney General, or district attorney, under article 191 of the Constitution.

5. FORFEITURE OF SHERIFF'S OFFICE—PARTIES PLAINTIFF.

Article 191 provides that the forfeiture of office shall be "at the suit of the Attorney General, or district attorney."

*(Additional Syllabus by Editorial Staff.)*

6. COURTS  $\Leftrightarrow$  224(10)—JURISDICTION—LOUISIANA SUPREME COURT—AMOUNT.

Where the emoluments of a sheriff's office for an unexpired term amounted to over \$2,000, as fixed by statute, the Supreme Court had jurisdiction of the Attorney General's appeal from a judgment refusing to forfeit and vacate the sheriff's office.

O'Niell, J., dissenting.

Appeal from Fifteenth Judicial District Court, Parish of Allen; Winston Overton, Judge.

Suit by A. V. Coco, Attorney General, in his official capacity, against R. E. Oden, Sheriff of Allen Parish, La., to have the latter's office declared forfeited. Exceptions of no cause of action overruled, and judgment for defendant, dismissing plaintiff's demand, and plaintiff appeals. Judgment reversed, and judgment rendered against defendant, declaring his office forfeited and vacated, and that he be dispossessed.

A. V. Coco, Atty. Gen., in pro. per. Cline & Bell, and Thomas Arthur Edwards, all of Lake Charles, for appellee.

SOMMERVILLE, J. The Attorney General, in his official capacity, brings this suit against R. E. Oden, sheriff of the parish of Allen in this state to have the office of the latter declared forfeited, because defendant accepted from and used a free pass on, and

accepted discriminating passenger rates from, the St. Louis, Iron Mountain & Southern Railway Company in this state, during the incumbency of defendant in office.

Defendant excepted to the jurisdiction of the district court *ratione materiae*, which exception was properly overruled. He further excepted on the ground that article 191 of the Constitution, under which the proceeding was brought, is not self-enforcing or self-operative. This exception was also properly overruled. He then filed an exception of no cause of action, which was also overruled.

The law forbids the use of free passes by members of the General Assembly and by public officers of the state; and the allegation that the defendant used a free pass states a sufficient cause of action for the forfeiture of his office. Defendant next excepted that plaintiff is without power, authority, or right in law to institute and prosecute this suit in his own name and person, and that he is likewise without authority or right to stand in judgment herein; that said suit under the law should and must be brought in the name and on relation and on behalf of the state of Louisiana. This exception was also overruled.

The defendant then answered, denying that he had used a free pass, or had received any discrimination in rates from the railroad company mentioned in the petition, but specially answered:

"That all transportation solicited, received or used by appearer on the line of said railway corporation was fully and legally paid for under a legal, valid, enforceable, and executory contract, with a legal, valid, and ample consideration, and that said transportation was neither free nor discriminatory; that to force a forfeiture of appearer's office and the emoluments thereof for receiving and using such transportation under such contract will be to deprive him of his liberty of contract and rights of property without due process of law, in violation of article 5 of the federal Constitution, and in violation of article 2 of the Constitution of the state of Louisiana, and deprive him of the equal protection of the law in violation of the Amend-

ment 14 to the Constitution of the United States, and in contravention of the Constitution of the state of Louisiana."

Defendant asked for trial by jury, which request was granted. There was judgment in favor of defendant, dismissing plaintiff's demand, and plaintiff has appealed.

Article 191 of the Constitution under which the Attorney General proceeded in this case is, in part, as follows:

"No member of the General Assembly, or public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly, ask, demand, accept, receive, or consent to receive, for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph, or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another.

"Any person who violates any provision of this article shall forfeit his office, at the suit of the Attorney General, or the district attorney, to be brought at the domicile of the defendant, and shall be subject to such further penalty as may be prescribed by law."

The authorization of the Attorney General to sue for the forfeiture of the title to office of the persons named in the article is clear. It is not therein intimated that the proceeding should be in the name of the state, or on behalf of the state.

[4, 5] The exception filed to the right of the Attorney General to proceed against defendant seems to be based on the theory that the suit should have been filed under R. S. § 2593, which provides for suits against usurpers and intruders into office, in which case it appears to be provided that the suit must be brought in the name of the state. But this is not a suit against a usurper or an intruder into office. It is a suit to destitute an officer of his office, and it was properly brought by the Attorney General under article 191. The Attorney General has literally complied with the article in bringing the suit. He expressly states that the suit is instituted under authority of the article of the Constitution providing for "forfeiture of office," and, if the

state should be a party to the suit, it has been made so, impliedly, by the Attorney General proceeding in the manner in which he has done.

The House of Representatives have the sole power of impeachment of the Governor and other named officers (article 218), and under article 222, the impeachment of other officers must be sued for in court. As the state is mentioned in the last article as a party to such suit, it is necessary that the state should be made a party in the impeachment of such officers.

The exception to the right of the Attorney General to file the suit was properly overruled.

The exception to article 191, not being self-operative, is without merit. It provides in terms for the forfeiture of office on the commission of certain offenses against the law therein stated, and it provides the remedy. "The suit of the Attorney General or the district attorney" must be brought in the courts of the state, and may not be brought elsewhere, at the domicile of the defendant. The article is self-operative.

[1-3] The admission of the defendant in his answer, and the evidence introduced at the trial of the case on the merits, is conclusive that defendant accepted and used a free pass from the St. Louis, Iron Mountain & Southern Railway Company in the years 1915-16, during his incumbency in office as sheriff of the parish of Allen. He therefore violated the law of the state, which forbade the acceptance and use of such free pass.

The defense that the defendant entered into a contract with the railroad company whereby the pass accepted by him from the railroad company was to be full consideration for all sheriff's fees which might be incurred by said railroad company in suits in the court of which defendant was sheriff is absolutely without merit. It was incompetent on the part of the sheriff to charge any other fees

than those fixed in the fee bill, and which were to be charged to all litigants and collected from them in cash by the sheriff. It was not competent for the sheriff to make the contract alleged to have been made. And the pass which he received from the railroad company in consideration of such fees was a free pass, and there was discrimination in passenger rates in his favor under such illegal, null, and void contract.

A free pass or discrimination in rates is one for which a full consideration is not given, and the transportation is not paid for in the usual way, at the usual time and at tariff rates.

"A 'free pass' means the privilege of riding over" a railroad "without payment of the customary fare." *Perkins v. N. Y. Cent. R. Co.*, 24 N. Y. 196, 203 (82 Am. Dec. 281); Words and Phrases, p. 2967.

The contract set up by the defendant is contra bonos mores, it is immoral, and it is against the public policy of the state. The law forbids the acceptance of a free pass for use by an officer of this state, and defendant has forfeited his office by the acceptance and use of such pass.

[6] Defendant has moved to dismiss the appeal on the ground that this court is without jurisdiction. There was an admission on the trial of the case "that the emoluments of office of sheriff for the unexpired term in this case is worth over \$2,000, as fixed by statute." There is more than the right to office therefore involved. The right to the fees of the office, which exceed \$2,000 is involved, and the court has jurisdiction. The motion to dismiss is denied.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment based thereon be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that there be judgment in favor of plaintiff and against R. E. Oden, sheriff of Allen parish, declaring the office of sheriff

held by him to be forfeited and vacated, and that he be dispossessed thereof.

O'NIELL, J., is of the opinion the proceeding should have been brought in the name of the state, by or on the relation of the Attorney General, or district attorney, and, therefore he respectfully dissents.

(79 South. 318)

No. 22978.

HERNDON v. WAKEFIELD-MOORE  
REALTY CO., Inc., et al.

WAKEFIELD-MOORE REALTY CO., Inc.,  
et al. v. HERNDON.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

1. VENDOR AND PURCHASER ⇨233—SALES—RECORDATION—STATUTE.

Under Rev. Civ. Code, art. 2286, contract for sale of a plantation was null and void for want of recordation as against third persons, and could not serve as the basis of suit by the vendee against them; they having purchased subsequently to the contract.

2. VENDOR AND PURCHASER ⇨239(1)—SALES—FRAUD ON VENDEE—VOID CONTRACT.

Where an unrecorded contract for sale of a plantation was void as against subsequent purchasers, such purchasers cannot be said to have perpetrated a fraud on the first vendee by misrepresenting his financial standing to the vendor, inducing it to break its contract, thus treating the contract as void.

3. VENDOR AND PURCHASER ⇨38—SALES—REMEDIES OF VENDOR—ACTION IN NULLITY.

If persons desiring to buy a plantation deceived the selling company, the deception bearing on a material part of the promise of sale, the company could nullify the contract, but a stranger to the contract could not.

4. EJECTMENT ⇨52—CITATION—SUMMONS IN NAME OF STATE—STATUTE.

Where the citation in ejectment proceedings summoned defendant in the name of the state of Louisiana and of the First judicial district court of the parish of Caddo, exception on the ground the citation had not been issued in the name of the state, in accordance with Code Prac. art. 774, and Const. art. 90, was properly overruled; the citation complying with Code Prac. art. 179, governing citations.

# 5. PROCESS ¶1—CITATION—CONSTITUTION.

Citation is not "process" within the meaning of Const. art. 90, providing that "the style of all process shall be 'the State of Louisiana.'"

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Process.]

# 6. AFFIDAVITS ¶12, 16—JURAT—MISDATING—CURE BY NEW SERVICE.

Where, it being the beginning of the year, jurat to the petition in an ejectment suit was erroneously dated January 3, 1917, instead of 1918, an exception thereto was frivolous, besides having been cured and a new service made.

# 7. VENDOR AND PURCHASER ¶52—SALES—PROMISE OF SALE AS SALE.

A promise of sale of real estate duly evidenced by writing and recorded is equivalent to a sale.

# 8. VENDOR AND PURCHASER ¶6—SALE OF REALTY UNDER ATTACHMENT.

Realty is susceptible of sale while under attachment, though it cannot be delivered, except by the fictive delivery which accompanies the authentic act, since, under Rev. Civ. Code, art. 2456, a sale, as between the parties, is perfect without delivery.

# 9. LANDLORD AND TENANT ¶83(1)—RENEWAL OF LEASE—SALE OF PROPERTY.

A sale of a plantation which divested the vendor of its ownership and of its power to lease, though made while the plantation was under attachment, was such a sale as was contemplated by the clause of the lease according to which it was not to be renewed in the event of a sale.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Suits by James R. Herndon against the Wakefield-Moore Realty Company, Incorporated, and others, and by the Wakefield-Moore Realty Company, Incorporated, and others against James R. Herndon, resulting in judgments for defendants in the first action and for plaintiff in the second, from which plaintiff in the first action and defendant in the second appeal. Affirmed.

Mills & Cook and Levy & Crane, of Shreveport, for appellant. Wise, Randolph, Rendall & Freyer, of Shreveport, for appellees W. F. Taylor and Z. R. Lawhon. J. S. Atkinson, of Shreveport, for appellee Wakefield-Moore Realty Co.

PROVOSTY, J. The plaintiff Herndon alleges that, as evidenced by telegrams which passed between him and the duly authorized agents of the defendant company, the latter sold him the Bagley plantation, but violated its said contract by making a promise of sale of the plantation to Taylor & Lawhon, being induced thereto by false and fraudulent representations made to it by the latter as to his ability to carry out his said contract, and the danger of his being thrown into bankruptcy and of the plantation becoming involved in the bankruptcy proceedings, that the defendant company should be compelled to specific performance of its said contract with him, and because of said fraud the said promise of sale to Taylor and Lawhon should be annulled, and its recordation ordered canceled.

By articles 2440 and 2462 of the Code, a sale or promise of sale of immovable property must be evidenced by writing duly signed before it can have effect even as between the parties, except as provided by article 2275; and by article 2206 "all \* \* \* contracts \* \* \* affecting" real estate "shall be utterly null and void except between the parties thereto" unless recorded. Plaintiff's petition leaves somewhat doubtful whether his said alleged contract was so evidenced; but, it failing to allege recordation, the suit was dismissed on the latter ground, on exception of no cause of action, as against Taylor and Lawhon, who are third parties, and the present appeal is from that judgment.

[1, 2] This alleged contract, being thus utterly null and void as against Taylor and Lawhon for want of recordation, cannot, evidently, serve as the basis of a suit against them; and yet this alleged contract, thus utterly null and void, is the very foundation stone of the edifice of plaintiff's suit against these two defendants. Evidently, then, the petition alleging this contract as a basis for suit shows no cause of action against said defendants. True, plaintiff alleges fraud on

the part of these defendants; but, as said in *McDuffie v. Walker*, 125 La. 167, 51 South. 105:

"It cannot be said that one perpetrates a fraud who merely treats as utterly null and void a contract which the law in terms declares 'shall be utterly null and void.'"

To be "utterly null and void" means to have no legal existence. Therefore, when Taylor and Lawhon came to deal with the defendant company, with respect to this property, this alleged contract of plaintiff had no legal existence as to them. It being nonexistent as to them, they would have scanned their legal horizon in vain to discover it, or to discover any rights that plaintiff might have under it. A nonexistent thing cannot be discovered; and still less can any rights such as would result from it if it existed. Taylor and Lawhon could not commit a fraud against a contract nonexistent as to them, and could not by fraud or otherwise violate rights nonexistent as to them. Between such a case of rights nonexistent, and which therefore cannot be violated by fraud or otherwise, and the suppositious case propounded by the court in *McDuffie v. Walker*, *supra*, of a third person who by fraud keeps a vendee from recording his contract, and then himself buys the property, there is the difference that such a vendee has a right as against third persons, namely, the right to have his contract recorded—a right valuable, or useful, especially as against third persons—and ought to have relief against a subsequent vendee who by deceit has deprived him of this right. Plaintiff had no rights whatever as against Taylor and Lawhon, who were at perfect liberty to treat his said alleged contract as naught.

[3] They, of course, were not at liberty to deceive the defendant company, and if they did, and if the deception bore upon a material part of the promise of sale which the defendant company entered into with them, the company would have a right of action in

nullity. But plaintiff, a total stranger to this contract, has no such right. He could have such right only if his alleged contract were valid; but as to Taylor and Lawhon, the real parties in interest, it is utterly null and void—nonexistent.

Plaintiff's allegations of fraud may becloud, but cannot alter, the stern fact that he is seeking to take this real estate away from Taylor and Lawhon by virtue of an alleged contract which the law declares to be utterly null and void as to these two defendants.

This nonexistence as to third persons of an unrecorded contract affecting real estate being a mere legal fiction, a mere legal fact, perceived by the legal mind, but not apparent to the ordinary mind, we experience some difficulty in holding fast to it, and accepting its legal consequences; but this must be done, else we lose our legal bearings, and stray into legal error. Insidious attacks like the present one upon that legal situation have been unfortunately too often successful in the past, but the door has now been closed upon them, let us hope permanently. *McDuffie v. Walker*, *supra*; *Bell v. Saunders*, 139 La. 1050, 72 South. 727, and cases there cited.

Plaintiff does not allege that any deception was practiced on him by which he was induced not to record his contract. He does not allege that any deception whatever was practiced on him, but upon the defendant company. Formulated in accordance with its legal substance, his complaint is that Taylor and Lawhon, not knowing of his contract, spoke ill of him, and thereby induced the defendant company to put itself in a position where it could no longer be compelled to specific performance of its contract with him; or, to adopt a formulation adhering more closely to the facts, but the same in legal effect, the complaint is that Taylor and Law-

hon, knowing of his contract, but knowing at the same time that it was utterly null and void, or, in other words, nonexistent, as to them, induced the defendant company, by speaking ill of him, to break its contract with him. Such a complaint sets forth, perhaps, a cause of action for slander or for having induced a contractor to break his contract, but does not set forth any rights by virtue of which real estate may be followed into the hands of third persons. It does not set forth any legal relation whatever between plaintiff and the real estate in so far as third persons are concerned; and plaintiff's suit is against third persons.

At the time the suit was filed the plaintiff Herndon was lessee of the plantation. His lease expiring, the defendants brought ejectment proceedings; and these were cumulated with the suit in nullity.

[4, 5] The citation in these proceedings summoned the plaintiff Herndon "In the Name of the State of Louisiana and of the First Judicial District Court of the Parish of Caddo" to appear, etc. He excepted to this citation on the ground that it had not issued "In the Name of the State of Louisiana," in accordance with article 774, C. P., and article 90, Const., which, as he contends, require all orders or writs or process so to issue.

This exception was properly overruled. The citation complies in all respects with article 179, C. P., which is the law governing citations. Besides, citation is not "process," within the intendment of said article of the Constitution. *Bludworth v. Somepyrac*, 3 Mart. (O. S.) 719.

[6] By an error such as frequently occurs in the first days of a new year, the jurat to the petition in this ejectment suit was dated January 3, 1917, instead of January 3, 1918; bore date one year before the filing of the petition, one year before the cause of action had arisen. This could mislead no one, and

do no harm. It was, however, excepted to. The exception was manifestly frivolous; but, for making assurances doubly sure, the error was corrected, and a new service was made. By this new service the defect would have been cured even if it had been serious.

Pending the suit in nullity, the promise of sale by the defendant company to Taylor and Lawhon was consummated by the execution and recordation of an authentic act of sale; and it was after this that the ejectment proceedings were brought. The plantation was then under attachment, it having been attached in the suit in nullity, for the purpose of bringing the defendant company into court; this company being a nonresident, domiciled in the state of Kentucky.

The lease of the plantation to the plaintiff Herndon was, by its terms, to be renewed automatically for one year, in the event the defendant company did not sell the plantation.

Plaintiff, Herndon, contends that the authentic act of sale by which the promise of sale was sought to be consummated was ineffective, for the reason that property is not susceptible of sale while under attachment, and that the promise of sale itself was not equivalent to a sale, and that consequently the place was not sold, and the lease was renewed for one year.

[7-9] We think a promise of sale of real estate duly evidenced by writing and recorded is equivalent to a sale (*Barfield v. Saunders*, 116 La. 136, 40 South. 593; *Lehman v. Rice*, 118 La. 975, 43 South. 639), and that property, especially real estate, is susceptible of sale while under attachment. True, it cannot be delivered, except by the fictive delivery which accompanies the authentic act (C. C. 2479); but that is no reason why it cannot be sold. As between the parties a sale is perfect without delivery. C. C. 2450. The sale in question was therefore perfect as between the defendant company and Taylor

and Lawhon; and, being such, it divested the company of its ownership of the property, and of its power to lease the property, or to renew an existing lease of it, and consequently prevented the renewal of the lease. How can plaintiff contend that a sale which divests the vendor of his ownership, and of his power to lease, is not such a sale as was contemplated by the clause of the lease according to which the lease was not to be renewed in the event of a sale.

The two judgments appealed from are affirmed at the cost of James R. Herndon.

(79 South. 320)

No. 22033.

**SAMMONS v. NEW ORLEANS RY. & LIGHT CO. (five cases).**

(Oct. 16, 1916. On the Merits, May 27, 1918. Rehearing Denied June 29, 1918.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR ⇐365(1), 792—ORDER OF APPEAL—JURISDICTION—WAIVER—DISMISSAL OF APPEAL.**

This court is without jurisdiction to entertain an appeal without an order of appeal from the trial court, which cannot be waived or dispensed with even by the appellee. The court will take notice of the absence of an order of appeal, and, of its own motion, dismiss the appeal.

**2. APPEAL AND ERROR ⇐797(2)—APPEAL BOND—DISMISSAL OF APPEAL.**

Including in the condition of an appeal bond superfluous matter is an informality for which the appeal will not be dismissed, especially when the motion to dismiss was filed more than three days after the return day.

**3. APPEAL AND ERROR ⇐624—FILING RECORD—TIME—CONSTRUCTION OF STATUTE.**

Article 883 of the Code of Practice, providing that, if the appellant be prevented, by an event not under his control, from filing the record on or before the return day of the appeal, he may, within three days after the return day, obtain further time to bring up the appeal, means, not that the appellant must make a formal demand to have the benefit of the three days grace, but that, if he requires further time, he must make the demand within the three days and prove to the satisfaction of the appellate court that he was prevented by an event not

under his control from filing the record on or before the return day.

**On the Merits.**

*(Additional Syllabus by Editorial Staff.)*

**4. STREET RAILROADS ⇐103(2)—PERSONAL INJURY—DUTY OF MOTORMEN.**

A motorman is justified in assuming, even until it is too late to avoid an accident, that one approaching the track where his view is obstructed will heed the apparent danger and have some regard for his own safety.

**5. STREET RAILROADS ⇐103(2)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.**

If a street car was being run too fast when approaching a street, which danger was apparent to a pedestrian whose subsequent negligence was the direct cause of his fatal injury, he had the last clear chance to avoid the accident, and his children could not recover.

**Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.**

Separate suits by Ione Cecil Sammons, Rose Muriel Sammons, Angus Marion D. Sammons, Meredith Kerker Sammons, and Angus Marion D. Sammons, tutor, against the New Orleans Railway & Light Company, all of which were consolidated with suit of Rose Muriel Sammons and tried together by agreement. Judgment for defendant rejecting the plaintiffs' demands, and on plaintiffs' joint motion a petition for a devolutive appeal was granted. Appeals of all the plaintiffs dismissed, except that of Rose Muriel Sammons, the motion to dismiss whose appeal was overruled, and judgment affirmed.

Martin H. Manion, John C. Hollingsworth, and Philip H. Mentz, all of New Orleans, for appellants. Hall, Monroe & Lemann, of New Orleans, for appellee.

**O'NIELL, J.** Each of the plaintiffs filed a separate suit against the defendant for damages for the killing of their father in a street car accident. On motion of the plaintiffs' attorneys, to which the defendant's attorneys consented, the five suits were ordered consolidated. When the cases were called for trial, the attorneys for the plaintiffs



and the defendant agreed that the five suits should be tried as one; that the court should render one judgment in all five suits, stating, if there should be judgment for the plaintiffs, how much should be allowed to each; and that, in the event of an appeal, only one appeal might be taken instead of five. The cases were tried as one, but the judge rendered and signed five separate judgments, bearing, respectively, the titles and numbers of the original cases on the docket of the court. The judgment in each case was in favor of the defendant, rejecting the plaintiff's demand.

The five plaintiffs filed a joint motion or petition for an appeal, but the order granted the appeal to Rose Muriel Sammons alone.

The five plaintiffs and their surety, Martin H. Manion, signed and filed one appeal bond, containing the condition:

"That the above-bound Meredith Kerker Sammons, Muriel R. Sammons, Ione C. Sammons, Angus D. Sammons, Angus Marion D. Sammons, tutor, shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them or that the same shall be satisfied by the proceeds of their estate, real or personal, if they be cast in the appeal; otherwise that the said Martin H. Manion shall be liable in their place."

The transcript of appeal was filed in this court on the third day after the return day of the appeal; and, on the fifth day after the filing of the transcript, the defendant filed a motion to dismiss the appeal on the following grounds, viz.: (1) That a proper motion of appeal was not filed; (2) that a proper order of appeal was not entered or signed; (3) that a proper appeal bond was not given; and (4) that the transcript was filed too late.

[1] There is no merit in the appellee's contention that all of the plaintiffs did not file a petition or motion for an appeal. In compliance with the agreement entered into before the trial, all of the plaintiffs joined in one petition or motion for an appeal. Only one of them, however, Rose Muriel Sammons, ob-

tained an order of appeal. Our construction of the agreement of counsel for plaintiffs and defendant is that it would have been sufficient for the court to have granted one appeal to all of the plaintiffs, and we cannot understand why the appeal was granted to only one of them. The other four plaintiffs, namely, Ione Cecil Sammons, Angus Marion D. Sammons, Meredith Kerker Sammons, and Angus M. D. Sammons, tutor, did not obtain an order of appeal.

In the case of *Gagneaux v. Desonier*, 104 La. 649, 29 South. 282, it was distinctly held that an appeal could not exist without a judicial order granting it; that the appellate court was without jurisdiction without an order from the trial court, granting an appeal; that the order of appeal could not be waived or dispensed with by consent of the appellee; and that the court should on its own motion take notice of the absence of an order of appeal and dismiss the appeal.

Counsel for appellants contend that the motion to dismiss the appeal for want of an order of appeal cannot prevail, because the motion to dismiss was not filed within the three days prescribed in the Code of Practice; and they cite the following cases in support of that contention, viz.: *O'Riley v. McLeod*, 2 La. Ann. 138; *Hall et al., Syndics, v. Nevill*, 3 La. Ann. 326; *Mitchell v. Lay*, 4 La. Ann. 514; *Boykin v. O'Hara*, 6 La. Ann. 115; *Temple v. Marshall & James*, 11 La. Ann. 613; *Creevy et al. v. Breedlove*, 12 La. Ann. 745; *Dumonchel v. Lemerick*, 21 La. Ann. 30; *Murrison v. Seller & Co.*, 22 La. Ann. 327; *Walker v. Sauvinet*, 27 La. Ann. 314; *Webb v. Keller*, 39 La. Ann. 60;<sup>1</sup> and *Monteleone v. National Union Fire Insurance Co.*, 128 La. 426, 54 South. 929.

In only three of the cases cited, *Temple v. Marshall & James*, 11 La. Ann. 613, *Walker v. Sauvinet*, 27 La. Ann. 314, and *Webb v.*

<sup>1</sup> 1 South. 423.

Keller, 39 La. Ann. 60, 1 South. 423, was it held that an appeal should not be dismissed for want of an order of appeal unless the motion to dismiss was filed within three days after the record was filed; and, in that respect, the decisions cited, and others to the same effect, were expressly overruled in the case of Gagneaux v. Desonier, 104 La. 654, 29 South. 282. Following the latter decision, we are constrained to dismiss the appeals of all of the appellants except that of Rose Muriel Sammons.

[2] As to Rose Muriel Sammons, although the condition of the appeal bond is declared to be that she and the other four plaintiffs "shall prosecute their appeal and shall satisfy whatever judgment may be rendered against them," our opinion is that the appellant Rose Muriel Sammons and her surety are bound by her obligation to prosecute her appeal and that the bond is valid. Including in the condition of the obligation of Rose Muriel Sammons, to prosecute her appeal, the obligation of the other four plaintiffs (who had not obtained an order of appeal), to prosecute their appeal, was a mere informality, for which we would not, in any event, dismiss the appeal on a motion filed more than three days after the transcript was filed in this court.

[3] The contention of the appellee that the transcript was filed too late is based upon the appellant's failure to apply to this court on or before the return day of the appeal and, on proving to our satisfaction that she was prevented from filing the record in this court on the return day by an event not under her control, to demand and obtain further time to bring it up. Appellee refers to the requirements of article 883 of the Code of Practice for obtaining, within three days after the return day of an appeal, further time to bring it up. Our interpretation of the article of the Code is, not that an appellant must make a formal demand to have

the benefit of the three days grace, but that, if he requires further time, he must make the demand within the three days following the return day, and prove to the satisfaction of this court that he was prevented by an event not under his control from filing the record on the return day.

It is ordered that the appeals of all of the plaintiffs be dismissed, except that of Rose Muriel Sammons, the motion to dismiss whose appeal is overruled.

MONROE, C. J., takes no part.

On the Merits.

O'NIELL, J. The five plaintiffs whose appeal was dismissed have taken a devolutive appeal, which has been consolidated with that of their sister, as to whom the motion to dismiss the appeal was overruled.

There is no dispute about the facts forming the general outlines of the case. The plaintiffs' father, walking across Baronne street, on the downtown side of Jackson, going to his home, in the direction of the river, at about 11 o'clock at night, was struck and killed by a street car going up Baronne street. The car line was a single track, on which, of course, the cars traveled in one direction only. The track was straight, and the view unobstructed, for a distance of two blocks, about 600 feet, from and below Jackson street. The neighborhood was a residence section of the city and very quiet at night. The car was well lighted, the front doors open, and the curtain removed. It was traveling at high speed, but probably not exceeding the limit fixed by municipal ordinance. It was making noise enough, as it approached Jackson street, to be heard more than a block from the scene of the accident. There was a "Go Slow" sign beside the track, below and near Jackson street; which sign, the defendant contends, was to be heeded by motormen in the daytime only, when there was considerable traffic on Jackson street.

A house fronting on Jackson street, on the downtown side, very near Barrone street, obstructed the motorman's view so that he could not see Mr. Sammons until the latter was on or very near the Barrone street sidewalk and within a distance of about 25 or 30 feet from the car track. Mr. Sammons' view of the car, of course, was likewise obstructed, but not his view of the light from the car, shining along the track. He was walking rapidly, and did not stop, look towards the car, nor change his speed, until he was struck down.

No explanation is given, nor theory advanced, as to why Mr. Sammons walked in front of the car, except that there is some evidence—and it is very doubtful—that he was intoxicated.

The plaintiffs contend that the defendant is liable for the neglect or failure of the motorman to have his car under such control as to be able to stop and avoid an accident when he saw the man so close to the track.

The motorman admits that it was too late to avoid the accident when he saw that the man would walk in front of the car. He testified that instantly he applied his brake and dropped his fender, and that nothing more could have been done then to avoid the accident. It is denied that the fender was lowered in time; but we think the circumstance that Mr. Sammons' body was not run over, but was shoved or carried across and beyond Jackson street and deposited beside the track, corroborates the motorman's statement that the fender was dropped into place before the car struck the man.

[4] It is too well settled to require citation of authority that, under the circumstances, the motorman was justified in assuming—even until it was too late to avoid an accident if the man should walk in front of the car—that he would heed the danger that was so apparent, and have some regard for his own safety.

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[5] If it should be assumed that the motorman should have obeyed the "Go Slow" sign, and that he was travelling too fast when he approached Jackson street, that danger was apparent to Mr. Sammons, whose subsequent negligence was the direct cause of the accident. He, not the motorman, had the last clear chance to avoid the accident.

The judgments appealed from are affirmed.

MONROE, C. J., takes no part.

(79 South. 322)

No. 23118.

STATE v. CUTRERA et al.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

1. HOMICIDE  $\S$  203(5) — EVIDENCE — DYING DECLARATION — HOPE OF RECOVERY.

The accusing declaration made by one not under oath or subject to cross-examination is inadmissible against the accused as a dying declaration, unless there is evidence showing to the satisfaction of the legal mind that the accuser when making it had no hope of recovery.

2. HOMICIDE  $\S$  203(3) — DYING DECLARATION — HOPE OF RECOVERY — EVIDENCE.

In a prosecution for murder, evidence held not to show that the deceased believed that he had no hope of recovery and was about to die when he accused defendants of having shot and cut him.

3. HOMICIDE  $\S$  203(5) — DYING DECLARATIONS — EVIDENCE.

Where the evidence did not show that deceased when he made a declaration accusing defendants was without hope of recovery, the testimony of the deputy sheriff as to what deceased had said shortly after his injury was inadmissible as a dying declaration.

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; R. Emmet Hingle, Judge.

Louis Cutrera and Seymour Cutrera were convicted of murder, and they appeal. Verdict and sentence annulled, and cause remanded with directions.

Oliver S. Livaudais and Fernando Estopinal, both of New Orleans, and Fred A. Ahrens,

for appellants. A. V. Coco, Atty. Gen. N. H. Nunez, Dist. Atty., of St. Bernard (Vernon A. Coco, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendants, appellants, were convicted of murder, without capital punishment, and sentenced to life imprisonment.

They complain of a ruling of the district judge, admitting in evidence against them, as a dying declaration, a statement made by the victim of the homicide, accusing them of the crime.

The objection to the evidence was and is that there was not sufficient proof to satisfy the legal mind that the deceased believed he was about to die, when he made the accusing declaration. That objection may be divided into two; the first being that there was not sufficient proof that the deceased made the statements which the court considered an abandonment of all hope of recovery, and the second being that the statements attributed to the deceased did not, with all the surrounding circumstances, make proof that the man had abandoned all hope of recovery, when he made the accusing declaration.

[1] This court, in *State v. Gianfala*, 113 La. 463, 37 South. 30 (on rehearing), adopted the opinion, borne out by a preponderance of legal authority, that an accusing declaration made by a person not under oath nor subject to cross-examination is not admissible in evidence against the accused person, in a criminal prosecution, as a dying declaration, unless there is evidence showing to the satisfaction of the legal mind that the person making the accusation had, at the time, no hope of recovery.

The only evidence offered in this case to show that the deceased had no hope of recovery when he made the accusing declaration is the testimony of a deputy sheriff to whom the declaration was made. The officer

arrived at the scene of the crime 1½ or 2 hours after the man had been shot and stabbed. The wounded man was yet lying where he had fallen on the ground. He was an Italian, but spoke both English and his native language. The officer, however, brought an Italian interpreter, who was present, listening to all that was said and translating into English what was said in Italian, during all of the time the wounded man was talking to the officer. There were also a number of soldiers and at least four other bystanders present during the conversation between the deputy sheriff and the wounded man.

The only witnesses who were called to prove that the statement was a dying declaration were the deputy sheriff and the Italian interpreter. Although the deputy sheriff testified that the interpreter "was right there" listening to the conversation and translating what was said in Italian by the wounded man, and although the interpreter himself testified that he came to the wounded man with the deputy sheriff and left with him, and therefore should have heard all that was said, the interpreter swore that the wounded man did not say anything, except that Seymour Cutrera had shot him and that Louis Cutrera had cut him.

The testimony of the interpreter was excluded by the judge, and the jury was instructed to disregard it, on the objection of the attorneys for the defendants, on the ground that it was not shown to have been a dying declaration, notwithstanding all of the testimony of the deputy sheriff on that subject had been heard and he had been allowed to relate to the jury the accusing declaration made by the wounded man. In fact, no evidence whatever was offered, after the deputy sheriff testified, to prove that the accusing statement made by the wounded man was a dying declaration.

It is argued on behalf of the state that the

ruling, excluding the testimony of the interpreter, was founded upon the erroneous opinion of the judge that the testimony was inadmissible merely because that witness had not heard the wounded man say he believed he was about to die, even though there was other proof that the wounded man did believe he was about to die, when he made the accusing statement. That idea is not clearly expressed in the statement per curiam. On the contrary, the ruling excluding the testimony of the interpreter, on the ground that there was not sufficient proof that the accusing statement related by him was a dying declaration, was, in effect, an admission by the judge that he was not yet convinced that the statement was a dying declaration, even though he had heard all of the evidence that was offered on the subject and had already permitted the deputy sheriff to relate the same accusing statement as a dying declaration of the wounded man.

The testimony of both the deputy sheriff and the interpreter shows that the latter must have heard all that the deputy heard, of what the wounded man said when he accused the defendants of having shot and stabbed him. The interpreter understood all that was said, either in English or in Italian; whereas, the deputy sheriff understood only what was said in English. And both witnesses testified that some of the wounded man's statements were in Italian and others in English. It is not contended that one of the witnesses was more worthy of belief than was the other; nor was there any intimation in the testimony that the interpreter might have forgotten any part of what the wounded man said. On the contrary, the interpreter's knowledge that the only purpose of his being brought into the presence of the wounded man was to hear and translate what the man had to say must have impressed upon him the importance of hearing and remembering all that the man had to say. Under those circumstances, we cannot under-

stand why the judge's reason for excluding from the jury the testimony of the interpreter was not applied also to the testimony of the deputy sheriff.

Before relating to the jury what the wounded man had said, the deputy sheriff testified, in the absence of the jury, that, as soon as he and the interpreter arrived, he asked Ferrara who had shot him, and the man replied that Louis Cutrera had cut him and that Seymour Cutrera had shot him. Asked what the man then said, if anything, about his condition, the witness replied that the man said, "Well, I don't believe I am going to live long;" and that that was all he said. The witness was asked whether the interpreter was then present, and replied:

"Yes, sir; he was right there. I even said to the young Italian, 'You ask him in Italian who cut him and who shot him,' and he asked him, and he told me in English what this man said."

On cross-examination, the deputy sheriff was asked to relate all that was said from the time he and the interpreter arrived at the scene of the homicide, and he replied:

"When I got down on my knees, I asked him, I says, 'How do you feel?' He says: 'I am going to die soon. Take me to the hospital as quick as you can.' And of course I got a stretcher and put him on (it) right away. He kept moaning a whole lot, and I laid him on the truck," etc.

The wounded man was taken to the hospital in New Orleans, where he died,  $4\frac{1}{2}$  or 5 hours after being wounded; that is, between  $2\frac{1}{2}$  and  $3\frac{1}{2}$  hours after telling the deputy sheriff who had shot and cut him.

[2] The evidence does not satisfy us that the wounded man believed—to the extent that he had no hope of recovery—that he was about to die, when he accused the defendants of having shot and cut him. In the case of *State v. Gianfala*, the desire of the wounded man, who had said he was going to die, to be taken to the hospital, was considered sufficient evidence of some hope

of recovery to render his accusing statement inadmissible in evidence as a dying declaration.

[3] The evidence against the defendants in this case, excepting the so-called dying declaration, was only circumstantial. The crime was committed in the dark. If the wounded man had lived to make his accusation under oath, and be cross-examined upon his reason for accusing the defendants of the crime, the effect of his statement might have been destroyed, or it might have been rendered altogether inadmissible. The constitutional right of a defendant in a criminal prosecution to be confronted by the witnesses against him is worth very little indeed when it is applied to a witness who relates what some one else said, as a dying declaration; for the cross-examination is then confined to the circumstances under which the declaration was made, and it affords no opportunity for exposing or investigating the source of knowledge, or reason for the statement, of the author of the accusing declaration.

Our conclusion is that the testimony of the deputy sheriff, relating what the wounded man said, was not admissible in evidence as a dying declaration. It is therefore not necessary to consider the other bills of exception, relating to the rulings, refusing a continuance, etc.

The verdict and sentence appealed from are annulled, and the case is remanded to the district court to be proceeded with according to law.

(79 South. 324)

No. 21157.

LOUISIANA SULPHUR MINING CO. v.  
BRIMSTONE R. & CANAL CO.

(Jan. 28, 1918. On Rehearing, June 29, 1918.)

(Syllabus by Editorial Staff.)

1. CORPORATIONS §442—OFFICERS—AUTHORITY TO SELL "RIGHT OF WAY."

When a corporation authorized its president to sell a right of way to another company, since

a "right of way" is a mere servitude, the president could sell a servitude only, and not the land itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right of Way.]

2. REFORMATION OF INSTRUMENTS §1—INTENTION OF PARTIES.

Equity may reform an act or sale so as to make it conform to the true intention of the parties.

3. REFORMATION OF INSTRUMENTS §2—SALE OF LAND.

Where mining company authorized president to sell right of way to canal company, but land itself was sold, in absence of proof that canal company sought a less interest, which could be furnished only by resolution of board of directors authorizing purchase, mining company cannot have reformation.

4. EVIDENCE §419(3)—PAROL EVIDENCE AFFECTING WRITING.

Where mining company's sale to canal company of land for right of way was made for cash, with nothing said as to further consideration, parol evidence, in mining company's suit, as to failure of consideration through abandonment of canal enterprise, was properly rejected as proving something beyond written contract.

5. FRAUDS, STATUTE OF §74(1)—PAROL EVIDENCE AFFECTING TITLE.

Where mining company's sale to canal company of land for right of way was made for cash, with nothing said as to further consideration, parol evidence, in mining company's suit, as to failure of consideration through abandonment of canal enterprise, was properly rejected as affecting title to realty.

O'Niell, J., dissenting in part.

On Rehearing.

6. CANCELLATION OF INSTRUMENTS §34(4)—STATUTE OF LIMITATIONS—ANNULMENT OF CONTRACT.

Civ. Code, art. 3542, declaring that actions for the nullity or rescission of contracts are prescribed by five years, has no application to an action to have decreed null a contract void on its face.

7. CORPORATIONS §442—CONTRACT OF SALE—NULLITY ON FACE.

Instrument whereby mining company by its president purported to convey land to canal company was null on face, in so far as it purported to convey anything more than right of way; directorate of mining company having authorized president to sell only right of way, and the resolution being attached to the instrument.

8. PRINCIPAL AND AGENT §152(4)—CONTRACTS—NULLITY ON FACE.

The test whether an act by an agent is voidable or absolutely void on its face is, not wheth-

er it might be ratified, but whether its nullity is only latent or is apparent.

Monroe, C. J., dissenting.

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Alfred M. Barbe, Judge.

Suit by the Louisiana Sulphur Mining Company against the Brimstone Railroad & Canal Company. From judgment for defendant, plaintiff appeals. Judgment set aside, etc.

McCoy & Moss, of Lake Charles, for appellant. Pujo & Williamson, of Lake Charles, for appellee.

PROVOSTY, J. Under date of September, 1905, the agent of the defendant company addressed to the plaintiff company the following letter:

"I have been engaged by the Brimstone Railroad & Canal Company to secure for them a right of way from the sulphur mines in this parish westward to the Sabine river. I notice that sections 31, 32 and 33 in Tp. 9 S. R. 11 W. is credited to you. The right of way desired is 200 feet wide and crosses your property approximately as shown on the plat on the margin of this letter, the exact distances from the section corners to be verified before any transfer is made.

"We are willing to pay the actual value for the land we use at its real value per acre at the present time. Lands in this locality are not generally considered very valuable, and this company being a common carrier, its building through that country should enhance values along its line we therefore trust that we can agree on a price per acre in harmony with present values, and that the proposition will be agreeable to you and your company.

"Will you not kindly give the matter consideration and write me at your earliest convenience."

Upon receipt of this letter, the board of directors of the plaintiff company adopted the following resolution:

"Resolved that the secretary of the Louisiana Sulphur Mining Company write to Mr. J. S. Thomson of Lake Charles, La., and find out through him, or others, the value of the land included in a right of way which the Brimstone Railroad & Canal Company desire to purchase from the Louisiana Sulphur Mining Company, said right of way to be 200 feet wide and running in a southwesterly direction through sections 33, 32 & 31 in township 9 south, range

11 west, belonging to the Louisiana Sulphur Mining Company, and after such value was obtained, if, in their judgment, the price justified the Louisiana Sulphur Mining Company in selling such right of way, that the president and secretary of the Louisiana Sulphur Mining Company be and are hereby authorized to sell such right of way for cash and to make the proper transfer of the same."

[1] A right of way, and the ownership of the land over which the right of way is to exist, are not the same thing. A "right of way" is a mere servitude. Hence by the acquisition of a right of way is understood the acquisition only of a servitude. *Moore v. Railroad Co.*, 126 La. 866, 53 South. 22. When therefore the said agent of defendant proposed to acquire for defendant a right of way, and the plaintiff authorized its president to sell a right of way, a servitude only could have been meant. Moreover, defendant had need of no other for the purposes of its canal. By inadvertence, or otherwise, however, the sale was made for the land itself to be covered by the right of way.

This was in November, 1905. Shortly thereafter the defendant company began constructing its canal on the land thus acquired, but soon discontinued the prosecution of the enterprise; and things remained in that condition until this suit was brought, January, 1914.

The allegation is that under said resolution the president of plaintiff company was without authority to sell more than a servitude, and that therefore the act should be reformed so as to be so restricted.

It is very evident that the said resolution did not authorize the sale of more than this. Consequently, the act will have either to be reformed as thus prayed, or else annulled altogether as unauthorized.

[2, 3] Equity may reform an act so as to make it conform to the true intention of the parties. But in the present case there is no proof that the defendant company intended to acquire a less interest than the land itself; hence the prayer for reformation cannot be

granted. 34 Cyc. 974; Davega v. Insurance Co., 7 La. Ann. 228; Aguilbau v. Insurance Co., 106 La. 148, 30 South. 148. The letter of the agent of the defendant company does not furnish this proof. Nothing short of a resolution of the board of directors of the defendant company authorizing the purchase could furnish it. Indeed, the presumption would be that the defendant company intended to buy the land itself, since that is what it did buy.

We have therefore to set the sale aside entirely; subject, however, to the right of the defendant company, if it so desires, to confirm it as of the sale of a servitude only.

[4, 5] Plaintiff further alleges that part of the consideration of the said sale was the benefit to be derived, in increased value and otherwise, by the adjoining lands of the plaintiff from the construction of the canal; and that this consideration having failed, as the result of the defendant company's having abandoned said enterprise, plaintiff is entitled to a resolution of said contract.

The sale was made for a cash price, with nothing whatever said as to any further consideration; and the said resolution is equally silent in that regard. The said allegation therefore is not proved. The parol evidence sought to be offered on that point was properly rejected, as going to prove something beyond the written contract, and as going to affect title to real estate.

This demand for annulment is predicated on breach of contract, and not on forfeiture because of nonuser, or abandonment; and, besides, if it were predicated on either of the latter grounds, the evidence in the record would be too scant to support it.

Plaintiff asks that its right to claim damages be reserved. There is no reason why whatever rights it may claim to have in that connection should not be reserved.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and

the same is hereby set aside; and that the sale made by the plaintiff company to the defendant company on November 3, 1905, acknowledged before Charles T. Soniat, notary public, recorded in book of conveyances of the recorder's office of the parish of Calcasieu, in Book No. 69 at page 602, as of date December 5, 1905, be and the same is hereby annulled; and that the inscription of same in the said conveyance book be canceled, unless, within 30 days from the date of the inscription of the present judgment in the records of the district court of the said parish, the defendant company cause to be recorded in the said conveyance book a resolution of its board of directors electing to hold the said sale effective only as the conveyance of a servitude of way on the land described in said sale, and not of the land itself, in which event the said inscription is not to be canceled, and said sale is not to be annulled, but is to remain in effect as the sale of a servitude.

And it is further ordered, adjudged, and decreed that the demand of the plaintiff company for the annulment of the said contract of sale be rejected as in case of nonsuit; the costs of this suit to be paid by the defendant; and that whatever rights the plaintiff may have to sue in damages be reserved.

O'NIELL, J., concurs in the decree, but not in the opinion that testimony was not admissible to show a further consideration than that expressed in the deed.

#### On Rehearing.

O'NIELL, J. The defendant has pleaded the prescription of five years, under article 3542 of the Civil Code; and that is the only defense urged on rehearing.

[6-8] The article declares that actions for the nullity or rescission of contracts are prescribed by five years. It has no application to an action to have decreed null a contract that is void on its face. The instrument in ques-



tion, with the procuration or resolution attached to it, in so far as it purports to convey title to anything more than a right of way or servitude, is null on its face. In that respect, it differs from the instruments that were in contest in the two cases relied upon by defendant, viz. *Brownson v. Weeks*, 47 La. Ann. 1042, 17 South. 489, and *Weathersby v. Springfield Lumber Co.*, 141 La. 577, 75 South. 416. The test, as to whether the act is only voidable or absolutely void, with that regard, is, not whether it might or might not be ratified, but whether the nullity is only latent or is apparent on the face of the instrument. A sale made by one who does not own the property and has no authority from the owner to sell it might be ratified by the owner, but it is none the less void, not merely voidable.

The decree heretofore rendered is reinstated and made final.

MONROE, C. J., dissents.

(79 South. 326)

No. 21188.

GASTAUER v. GASTAUER.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

1. PRINCIPAL AND AGENT §148(2)—KNOWLEDGE OF AGENTS—IMPUTATION TO OTHER PARTY.

One who acquired note and mortgage on community property of husband and wife from his lawyers then acting as agents of the husband in selling the note, was not charged with knowledge of any want of authority of the lawyers to negotiate the note.

2. HUSBAND AND WIFE §267(1)—DISPOSITION OF PROPERTY—DISABILITY OF HUSBAND—DIVORCE SUIT.

With whatever motive a husband discontinued his divorce suit, the suit was discontinued, and the disability of the husband, under Rev. Civ. Code art. 150, to dispose of the immovables of the community, incident to the pendency of such suit, no longer existed.

3. HUSBAND AND WIFE §271—COMMUNITY PROPERTY—MONEY EARNED BY WIFE.

By Rev. Civ. Code, art. 2402, money earned by a wife before institution of her separation suit belonged to the community, and its payment for account of the community after her institution of suit was simply payment of a community debt with community funds.

4. HUSBAND AND WIFE §268(1)—COMMUNITY DEBT—COSTS OF SEPARATION SUIT.

Judgment for a wife in her suit for separation from bed and board, under Rev. Civ. Code, art. 2432, retroacted to date of filing of suit, so that the costs of suit taxed against husband are not chargeable to community, but to him separately.

5. HUSBAND AND WIFE §268(1)—SEPARATION—JUDGMENT AGAINST HUSBAND—CHARGEABILITY TO COMMUNITY—STATUTE.

Third person's judgment against husband for debt accruing after wife's institution of separation suit was a separate debt of the husband, not chargeable to the community; judgment in separation suit retroacting to date of filing under Rev. Civ. Code, art. 2432.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit for separation by Mrs. Sophie Gastauer against George Gastauer, her husband, resulting in judgment for plaintiff, who petitioned for the partition of the community of acquêts and gains existing between her and her husband. Judgment was rendered ordering sale of the property and partition of the proceeds, and referring the parties to a notary, who, after the property was sold, took possession of the proceeds, and prepared a project of partition, submitting it to the parties; Otto Walther, a mortgage creditor of the community, objecting. From judgment maintaining Walther's objection and amending the project of partition by recognizing his claim, etc., plaintiff and defendant appeal. Judgment set aside in part, and affirmed in part.

George J. Unterelner, of New Orleans, for appellant Mrs. Sophie Gastauer. Benjamin T. Waldo, of New Orleans, for appellant George Gastauer. Woodville & Woodville, of New Orleans, for appellee Otto Walther.

PROVOSTY, J. After a judgment of separation from bed and board had been rendered in favor of plaintiff against her husband (132 La. 942, 61 South. 879), and plaintiff had accepted the community of acquêts and gains that had existed theretofore between them, a partition of the community property was ordered. The property was converted into cash, and the notary to whom had been referred the making of the partition filed his project of partition. In it he recognized certain claims as being debts of the community, and others he noted as being contested.

[1] Among the latter is a claim of Otto Walther for \$1,000, represented by a note secured by a mortgage on the community property. Gastauer contends that this note was negotiated by his then lawyers without his consent. His testimony is not consistent with itself, nor with the attending circumstances; and is contradicted by that of the lawyers. We believe the latter; but, if it were otherwise, Walther's claim would still have to be maintained, as he acquired the note in good faith, for value (\$950), before maturity. Suspicion is sought to be thrown upon whether the note was negotiated at all; but the evidence satisfied the learned trial judge, and satisfies us that it was. The learned counsel for Mrs. Gastauer questions the good faith of Walther, but for so doing bases himself upon the erroneous assumption that because Walther at the time he acquired the note was the client of the said lawyers he must be charged with knowledge of this supposed want of authority of these lawyers to negotiate the note. Such an imputation of knowledge could have been made only if the lawyers had been Walther's agents for acquiring the note; whereas they were the agents of Gastauer for selling it, and Walther dealt with them as such.

[2] The said note and mortgage were executed after Gastauer had brought a suit for divorce against his wife, and had discontinued it. Mrs. Gastauer contends that the

discontinuance was for the purpose of relieving Gastauer from the disability a husband is under to dispose of the immovables of the community of acquêts and gains pending a suit for divorce (article 150, C. C.), and this solely that he might defraud her by the execution of this mortgage. The answer is that, no matter what may have been the motive of the discontinuance the suit was none the less discontinued, and that, a divorce suit being no longer pending, the disability incident to the pendency of such a suit no longer existed.

[3] Another disputed item is \$611, which after the institution of the suit of separation from bed and board Mrs. Gastauer paid to the Union Homestead Association for account of the community. The money with which this payment was made was earned by her before the institution of the separation suit, and therefore belonged to the community (article 2402, C. C.); so that the payment was simply the payment of a community debt with community funds.

Another disputed item is \$519, of which there is no further specification in the record, or in the brief, than reference in general to the record in the separation from bed and board suit, and the following:

"To amount due Mrs. Gastauer, paraphernal funds, belonging to her advanced by her for the benefit of the community lately existing between plaintiff and defendant, \$1,242."

We assume that, if this claim had been intended to be seriously urged, there would have been greater particularization of it than this.

Another disputed item is \$2,148 which Mrs. Gastauer says she spent during the pendency of the suit in separation for the support of the two sons and two daughters of the marriage. The youngest was 19 at the date of the trial. The community property amounts to \$3,884.80, and is about absorbed by the community debts. Whether the husband had any other property is not positively shown,

nor what have been his earnings. He was never called upon to contribute towards the support of these young people. Possibly, if such a demand had been made, he would have required them to earn their own livelihood. And, indeed, except as to the youngest daughter, still attending school, the record does not show positively that they have not done so. As to what expenses were incurred, the record is worse than vague. It may be that one spouse may recoup from the other one-half of the expenses voluntarily incurred in support of the children of the marriage; but that question does not necessarily arise upon the facts here stated, and hence is not now decided.

[4] The judgment in the suit in separation from bed and board retroacted to the date of the filing of that suit (C. C. 2432); hence the costs of that suit, \$214.60, which the husband was condemned to pay (132 La. 942, 61 South. 879), are not chargeable to the community, but to the husband separately.

[5] In like manner the judgment obtained in the suit of Untereiner v. Gastauer (No. 100789) for a debt of \$233.05 accrued after the institution of the suit in separation from bed and board is a separate debt of the husband.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and is hereby, set aside in so far as it recognizes and orders the payment of the claim of Mrs. Gastauer for \$611.82, and in so far as it charges the community with the items \$214.60, costs in divorce suit, and \$233.05, judgment in suit Untereiner v. Gastauer (No. 100789), and the said judgment be, and is hereby, affirmed in so far as it rejects the claims of Mrs. Gastauer for \$519, alleged paraphernal funds advanced by her to the community of acquêts and gains, and for one-half of \$2,148, alleged expenses incurred by her in support of the children of the marriage, and recognizes the mortgage of Otto

Walther as a community debt, and it is ordered, adjudged, and decreed that the said claim for \$611.82 be, and the same is hereby, rejected, and that the above-mentioned two items of \$214.60 and \$233.05 be, and the same are hereby, decreed not to be community debts, but separate debts of the husband, and that the costs of this appeal be paid one-half by the community and one-half by the husband.

(79 South. 328)

No. 22954.

REAGAN et al. v. LOUISIANA WESTERN R. CO.

In re REAGAN et al.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

1. CERTIORARI  $\S$  64(1)—REVIEW—SCOPE.

Where defendant, who appealed to the district court, acquiesced in its judgment overruling appellee's motion to dismiss the appeal, and does not ask any relief on appellee's certiorari, Supreme Court need not consider correctness of ruling rejecting defendant's demand for dismissal of suit because abandoned.

2. JUSTICES OF THE PEACE  $\S$  167(3)—APPEAL — DISMISSAL FOR WANT OF PROSECUTION — PARTIES—STATUTE.

Under Civ. Code, art. 3519, as amended by Act No. 107 of 1898, providing that if plaintiff allows five years to elapse without prosecuting suit shall be considered abandoned, and in view of Code Prac. art. 100, defining plaintiffs, defendant, appealing from justice's court, does not become plaintiff in district court, and his appeal will not be dismissed for lapse of five years, without prosecution.

Suit by Mary Ann Reagan and others against the Louisiana Western Railroad Company. Judgment for plaintiffs in justice's court, and defendant appealed to the district court. Plaintiffs' motion to dismiss the appeal and defendant's demand to have the suit dismissed were overruled, and plaintiffs apply for writ of certiorari. Ruling refusing to dismiss the appeal affirmed.

Smith & Carmouche, of Crowley, for relators. Phillip S. Pugh, of Crowley, and Denegre, Leovy & Chaffe, of New Orleans, for respondent Louisiana Western R. Co.

O'NIELL, J. The relators filed suit and obtained judgment against the defendant railroad company in the justice of the peace court, for the value of a cow killed by a train. The defendant took a suspensive appeal to the district court, where the case remained more than five years without any proceeding being had or action taken in the prosecution of the suit or appeal.

The plaintiffs, appellees in the district court, invoking the Act No. 107 of 1898, p. 155, took a rule upon the appellant to show cause why the appeal should not be dismissed. In answer to the rule, the appellant urged that, according to the terms of the statute, the appeal should not be dismissed, but the suit itself should be considered abandoned, and should therefore be dismissed. After trial of the rule, the district judge overruled the appellees' motion to dismiss the appeal, and also the appellant's demand to have the suit itself dismissed. The case is before us on a writ of certiorari issued at the instance of the plaintiffs, appellees in the district court, demanding merely that the appeal to that court be dismissed and the case remanded to the justice of the peace court for execution of the judgment of that court.

[1] As the defendant, appellant in the district court, has acquiesced in the judgment rendered by that court on the rule to show cause why the appeal should not be dismissed and is not asking for any relief at the hands of this court, we are not called upon to consider whether the ruling was correct in so far as it rejected the defendant's demand to have the suit itself dismissed as having been abandoned. The only ques-

tion presented is whether the appeal to the district court should have been dismissed.

[2] Act No. 107 of 1898 is an amendment of, or addition to, article 3519 of the Civil Code, under the heading, "Of the Causes Which Interrupt Prescription." Before being amended, the article provided:

"If the plaintiff in this case, after having made his demand abandons or discontinues it, the interruption [of prescription] shall be considered as having never happened."

The statute added this paragraph, viz.:

"Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same."

To hold that the statute is authority for a district judge to dismiss an appeal, because of the lapse of five years without any steps being taken in the prosecution thereof, we would have to say that a defendant who appeals from a judgment rendered in a justice of the peace court becomes the plaintiff in the district court. As appeals from the justice of the peace court are tried de novo in the district court, a defendant cannot be regarded as plaintiff merely because he is appellant in the district court.

In support of their contention that an appellant is to be considered a plaintiff in the district court, even though he was defendant in the justice of the peace court, the relators rely upon the decision in *State ex rel. Boone v. Edwards*, Judge, 106 La. 210, 33 South. 199. The ruling in that case was merely that, under section 5 of Act No. 203 of 1898, the clerk of the district court could require an appellant before that court to give security for costs, although the appellant was defendant in the justice of the peace court. The basis of the ruling was that the statute did not restrict to plaintiffs the duty of furnishing bond for costs, but declared merely that the clerks of district courts might de-

mand security for costs at the time of the filing of a suit. It was not said that every appellant should be regarded as a plaintiff. On the contrary, it was said to be questionable whether a defendant, on appeal to the district court, became the plaintiff in the suit.

Be that as it may, article 100 of the Code of Practice declares that the plaintiff in a suit is the one who sues another for something that he says is due or belongs to him, and that the defendant is the one against whom the suit is brought.

Act No. 107 of 1898 was not intended to provide a cause or ground for dismissing an appeal. The object or purpose expressed in its title is merely "to amend and re-enact article 3519 of the Revised Civil Code of 1870." That article has no reference whatever to causes for dismissing an appeal.

The ruling of the district court, refusing to dismiss the appeal, is affirmed.

(79 South. 329)

No. 21617.

**DARBY v. EQUITABLE LIFE ASSUR. SOC.  
OF THE UNITED STATES.**

(June 29, 1918.)

*(Syllabus by Editorial Staff.)*

**1. INSURANCE §364—LIFE INSURANCE—LIABILITY OF INSURER—CANCELLATION.**

Where life insurer, before canceling policy for nonpayment of premium, gave insured due notice of date when premium would fall due, of due date of note, of intention to cancel unless it was paid, and of willingness to reinstate policy if premium and note were paid, or premium and interest on note, insurer having died after cancellation, full amount of policy is not due.

**2. INSURANCE §360—LIFE INSURANCE—FORFEITURE—STATUTE.**

By Act No. 193 of 1906, life insurance policies are nonforfeitable after they have been in force three years, having then a cash or surrender value.

**3. INSURANCE §369—LIFE INSURANCE—CALCULATION OF SURRENDER VALUE.**

In absence of expert showing to contrary, court will assume that calculation of surrender

value after three years, as made and agreed to in life policy, is correct.

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Suit by Mrs. Eveline M. Darby, widow of Henri Gerac, against the Equitable Life Assurance Society of the United States. From judgment for defendant, plaintiff appeals. Affirmed.

Cammack & Broussard, of New Iberia, for appellant. Farrar, Jonas, Goldsborough & Goldberg, of New Orleans, and Burke & Smith, of New Iberia, for appellee.

PROVOSTY, J. Plaintiff sues as beneficiary under a policy on the life of her deceased husband. She demands the full amount of the policy, \$10,000, and, in the alternative, the withdrawal value. The yearly premiums were of \$353.90, payable in advance. The first and second were paid. The third was to fall due on April 25, 1912. On the 13th of that month the defendant company made a loan of \$430 to the assured, taking his note for that amount falling due April 25, 1913, secured by pledge of the policy, and bearing 5 per cent. interest payable in advance. The amount of the third yearly premium, together with the interest of one year on the note, were deducted from this loan, and the balance was paid to the assured. When the fourth yearly premium fell due, in April, 1913, the assured obtained an extension of time until July 25, 1913, in consideration of a cash payment of \$60.20. The loan of \$430 was made on the condition that if it was not reimbursed promptly at the maturity of the note the defendant company should have the right to cancel the policy without further notice. On November 19, 1913, the fourth yearly premium not having been paid, nor the note, the defendant company canceled the policy. The assured died in October, 1914.

[1] For claiming the full amount of the

policy the plaintiff contends that notice was not given to the assured of the intention to cancel the policy. As a matter of fact, the defendant company was reluctant to cancel the policy, and therefore gave sedulously every notice that a desire to have the policy continued in force could have prompted the giving of, namely, of the date when the yearly premium would fall due, of the date when the note would fall due, of the intention to cancel the policy unless the note was paid, of the willingness of the company to reinstate the policy if the premium and the note were paid, or the premium and the interest on the note. Clearly, under these circumstances, the full amount of the policy is not due.

[2, 3] Under the terms of Act 193, p. 346, of 1906, life insurance policies are nonforfeitable after they have been in force three full years. They have then a cash or surrender value. Plaintiff would have this surrender value be in the present case the sum of the payments made by the assured less one-fifth thereof, and less the amount of the loan and interest. And plaintiff would include among these payments the third yearly premium which was paid out of the loan, which loan was never reimbursed, so that the payment was in reality made with the company's money. Plaintiff finds the surrender value to be \$413.40. The only moneys of assured received by the company were the two first premiums, \$707.80, and the \$60.20, paid for the extension of time, a total of \$768. Deducting from this the \$413.40, the surrender value as found by plaintiff, we have \$352.60, so that according to plaintiff's computation, the company would have carried this \$10,000 risk for three years and three months for \$352.60. Needless to say this conclusion is totally unacceptable. The policy recites that its surrender value after three years is to be \$430, and that from that amount is to be deducted any loan that may have been made to the assured. In the ab-

sence of any expert showing to the contrary, we will assume that the calculation of the surrender value as thus made and agreed to in the policy is correct. The loan was of the exact amount of the surrender value. There is therefore nothing coming to plaintiff. Judgment affirmed.

(79 South. 330)

No. 22575.

SIMON v. MEAUX.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

DIVORCE ~~25~~ — HUSBAND AND WIFE ~~287(1)~~—ACTION FOR SEPARATION—CONDONATION—COMMUNITY PROPERTY.

Where the general conduct of a husband and particular acts which might have afforded the wife a cause of action for separation from bed and board have been condoned, and the parties have continued to live together, though unhappily, the mere fact that the husband makes a sale of community property and intimates an intention to sell more will not, of itself, nor with the conduct and acts theretofore condoned, constitute a sufficient cause upon which to base such action, and particularly where the litigants have lived together as husband and wife for over 50 years; since, as head and master of the community, it is the privilege of the husband to sell its property, in good faith, without the permission or approval of the wife.

Appeal from Seventeenth Judicial District Court, Parish of Vermillion; W. W. Bailey, Judge.

Suit by Marie Melize Simon, wife, against A. D. Meaux, for separation from bed and board and a partition of community property. Judgment for plaintiff, and defendant appeals. Judgment annulled, and judgment for defendant dissolving the injunction issued and rejecting plaintiff's demands.

Broussard & Samson and J. R. Kitchell, all of Abbeville, for appellant. W. B. Gordy and Preston J. Greene, both of Abbeville, for appellee.

## Statement of the Case.

MONROE, C. J. After living together for 51 years, until the defendant had passed the seventy-fifth anniversary of his birth, becoming the parents of 12 children, of whom 8 survive and 7 are married and (some) have grown children of their own, plaintiff brings this suit against her husband for separation from bed and board and a partition of the property of the community. Thirty-seven witnesses, including all the children and "in-laws," and several of the grandchildren, of the marriage, were called on behalf of plaintiff, and a bare half dozen, mainly outsiders, on behalf of defendant. Plaintiff, herself, and the witnesses who profess to know most about the matters considered relevant to the issue presented, begin their testimony by telling what they know of an incident which occurred 18 years before, and by far the greater proportion of the testimony adduced relates to incidents and conditions occurring and existing from that time down to within 2 or 3 years of the institution of the suit. When the litigants were married (in 1864, as we take it), they were poor—having not more than \$500 between them. The property of the community, inventoried and appraised for the purposes of this suit, is valued at \$49,949, and, we apprehend, is worth considerably more than that; there being included two sections of land which appear to be under cultivation or used for stock raising, and the indications being that there is other land not included in the inventory, since defendant testifies that he still owns 1,600 acres. The sons, with the exception of Remus, the youngest, aged 28, appear also to have acquired property; Delmas, the eldest, aged 48, who is unmarried, being the owner of over half a section of land, which he cultivates as a farm. After testifying to that effect, and that he left his father's and went to his own place at the age of 23, and later, returned to his father's, he was, at

once, asked whether he recalled the time when it was claimed that his mother had been struck by his father, to which it was objected that the incident was too remote, had been condoned, and was not admissible under the allegations of the petition, which objections having been overruled, and it having been agreed that the same objection and ruling should apply to all such testimony, the witness answered, "Yes, that has been, more or less, about 18 years ago." And, so, with many of the other witnesses. It is beyond dispute, however, that, for 8 years after the incident in question, plaintiff and defendant lived together as husband and wife, and that, during the remaining 10 years of the period of 18 years, plaintiff had practically severed the marital relations, occupied a separate room in the house from that occupied by her husband, and held no other than unavoidable and the coldest intercourse with him, he going his way, and she hers, until on October 16, 1916, defendant sold 160 acres of low lying land, which was followed, on the 21st of the same month, by the institution of this suit, concerning which, plaintiff, while testifying, was asked the question and made answer as follows:

"Q. Is it not a fact that the old gentleman selling this property alarmed you, and that is the real reason you filed this suit; that is the thing that worried you? A. That, and a great many other things. For a long time I have seen the thing coming. He had already warned me in advance that it was his intention to sell everything, but I didn't believe this would happen. I brought this suit for that reason and many other reasons."

Testifying in regard to the incident to which we have referred, she states that defendant, at that time, made her a great many promises, and among them that (translated from the French, in which the testimony was given):

"If you will want, I promise you, when Remus, our youngest child, has arrived at the age of majority (he was then 10 years old), I will convey to you one-half of the property that we possess; I will put it in your name."

Remus, as we have stated, had attained the age of 28 years when this case was tried; he was married, had children, and had acquired no property; and in giving his testimony he seemed to be unable to recall any redeeming, or approximately redeeming, trait that his father may have possessed, but remembered quite distinctly the particulars and language used in connection with the "incident" upon the occasion of which, at the age of 10, he and his parents were the only persons present. He also remembers, or testifies to, statements made to him by his father, concerning his mother, which appear to us incredible.

#### Opinion.

It will readily be understood that, for a husband and wife beginning life in the country, with practically no means, and, as we infer, but slight educational advantages, to accumulate \$50,000, as earnings mainly from the soil, whilst, at the same time, rearing to vigorous maturity 8 out of 12 children, who appear, with the possible exception of the youngest, to have early developed a capacity to take care of themselves, an intelligence superior to that of most people similarly situated, untiring industry, and stern self-denial, must have been required, and we have no doubt, judging from the results, and from the testimony that they have given, that both the litigants now before the court possessed and regulated their conduct in accordance with those attributes during the greater part of the more than 50 years of their married life. Unfortunately, however, it sometimes happens that hardness of life develops hardness of character in which the graces and amenities struggle for existence and die, even as flowers may struggle and die between paving stones; and so it has been in this instance. About the only thing that plaintiff and defendant seem to have considered not worth saving was their affection for

each other, though upon that depended the one great thing without which all others were valueless—their happiness. From our reading of the testimony, we conclude that the defendant has been most to blame. The incident of 18 (now 20 or more) years ago, as narrated by plaintiff, was infinitely to his discredit, and, though his account of it is more favorable to himself, we are inclined to think that hers is the better supported by the evidence. We think, however, that, grievous as the wrong may have been, it was long since condoned by plaintiff and should not have been resurrected as a cause of action in this case; and other instances, of the use of bad language by defendant towards plaintiff, said to have occurred subsequently, but at periods of from 2 to 7, 8, or 10 years prior to the institution of this suit, were equally inadmissible; and so, too, was the testimony to the effect that, during the past 20 years, defendant has gambled in a small way, and has been drinking in a larger way. Neither the one nor the other of those vices had grown any worse within the year or two preceding this suit than they were 20 years before, and neither of them appears to us to have constituted the real reason for the bringing of the suit; nor did the coarse food with which, it is said, the family was provided, constitute that reason. It is not shown that it had ever been better. As the parties have not been on easy speaking terms for the past 10 years, their home does not appear to have been agreeable to them, and they have absented themselves a good deal, leaving the housekeeping to two young grandchildren, who have, no doubt, done as well as they could, but who would not assume to do many things which might have been done by the mistress of the house. In her original petition, plaintiff alleges that:

"During the last six or seven years, her said husband has struck her on various occasions; in particular, he threw a glass at her which struck her on the head," etc.



It was admitted on the trial that defendant has not struck plaintiff within the last six or seven years, or at any time, save upon the occasion of the incident 18 years ago, and defendant denies that he then struck her. It is alleged that:

"Defendant has already squandered and sold for nothing some of the real property which belongs to the community, and is about to sell more of the property which has been accumulated by mutual efforts of petitioner and her said husband."

It was shown on the trial that he sold 160 acres of low lying land, which had Cherokee roses growing on it and a coulee running through it, from the waters of which latter it was subject to inundation, and that he received \$3,800 for it, of which he used \$2,160 in paying off a mortgage, \$600 in paying a note held by the bank, about \$100 in paying blacksmith and store accounts, and the balance was still in his possession. Another of plaintiff's allegations is:

"That, on account of the ill treatment of her said husband as aforesaid, and on account of his attempting to dispose of the property belonging to the community of acquêts and gains which existed between her and her said husband, she is not only entitled to a separation from bed and board, but a settlement of the community aforesaid."

And she prays for an inventory, an injunction restraining defendant from further disposition of the community property, and final judgment, etc.

We are satisfied that the litigants are not living happily together, and have not been doing so for a long time; but their relations are such that they have very little to do with each other, and, if they meet, the language used by the plaintiff, who is a high-spirited woman, is about as unparliamentary as that used by defendant, who also has a temper of his own. That condition has endured for some years, and has not been, and would not now be, set up as a ground for separation from bed and board, were it not that defendant has made the sale of his land. But,

though some relief might be afforded plaintiff were it shown that defendant is deliberately spoliating the community for the purpose of impoverishing her, we know of no law which entitles a wife to a separation from bed and board merely because the husband has made a sale of community property and has intimated an intention to sell more, since, as head and master of the community, it is his privilege to sell its property, in good faith, without the wife's permission or approval.

It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment for defendant, dissolving the injunction herein issued and rejecting the demands of the plaintiff at her cost in both courts.

(79 South. 332)

No. 23096.

STATE v. BLOCK.

In re BLOCK.

(June 29, 1918.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §138—TRANSPORTATION OF LIQUOR — OFFENSE — CONSTRUCTION OF STATUTE.

Neither from its title nor its text can it be inferred that it is any part of the purpose of Act No. 23 of 1915 (Ex. Sess.) to make it unlawful for a citizen of another state to buy intoxicating liquor from a merchant in Louisiana, who is legally authorized to sell it, and carry the same, on his person or in his personal baggage, into such other state, there to be used by himself or his family, or otherwise disposed of as he may think proper. Whether such acts would contravene the laws of the state ad quem, or of the United States, is a question not here presented.

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW §1111(3) — BILL OF EXCEPTIONS—FACTS.

Where neither the statements per curiam, part of the trial bill of exceptions, nor the trial judge's return to the rule nisi challenged the statement of facts in the motion for a new trial made a part of the signed bill reserved to its overruling, the facts therein alleged are taken as conceded.

Ad. Block was convicted of unlawfully carrying and delivering intoxicating liquors, his motion in arrest of judgment was overruled, and he applies for certiorari and prohibition. Conviction and sentence annulled, and relator discharged.

Thomas W. Robertson, of Minden, for applicant.

#### Statement of the Case.

MONROE, C. J. Relator was prosecuted under a bill of information which charges:

That on or about March 28, 1918, he did "willfully and unlawfully carry and deliver intoxicating liquor from a point within the state of Louisiana into a territory of this state where the sale of intoxicating liquor is prohibited by law, without marking on the outside of the package containing such intoxicating liquor, where it can be plainly seen and read the words, 'This Package Contains Intoxicating Liquor,' and the quantity thereof, contrary to the form of the statute," etc.

Defendant filed, successively, a motion to quash the bill, on the grounds that it charges no offense known to the law, and that, if Act No. 23 of 1915 (Ex. Sess.) be relied on as creating an offense such as that charged, it is unconstitutional, since no such object is expressed in the title; a motion for a bill of particulars giving the name of the person to whom and the time and place when and where the alleged delivery of liquor was made, and whether with intent to violate the law, or for the defendant's personal use; a motion for new trial, in which it is alleged that defendant had purchased several quarts of whisky in Monroe, La., with a view of taking them, for his personal use, to his home in Garland City, Ark., that he was carrying them in a valise, or "grip," upon which there was no mark indicating its contents, that he left the train of the Vicksburg, Shreveport & Pacific Railroad at Sibley station, preparatory to boarding the train of the Louisiana & Arkansas Railroad, which was to carry him to his destination, and was there arrested, and detained, and his grip, with its contents,

seized by the sheriff of Webster parish, and that, though convicted upon these facts, he was guilty of no offense; a motion in arrest of judgment. And, his motions having been overruled, and sentence pronounced, from which no appeal lies, he applies to this court for certiorari and prohibition, in order that the validity of the same may be inquired into.

#### Opinion.

This prosecution is founded upon Act 23 of 1915 (Ex. Sess.), the title of which reads, and the text of which (so far as here required) may be stated as follows:

"An act to regulate the shipment of intoxicating liquors into portions of this state where the sale of liquor is prohibited, either from within or without the state; to define the term intoxicating liquor as used in this act; to regulate the delivery of intoxicating liquors to consignees; to provide for the marking of packages containing intoxicating liquors; to provide for the making and preservation of records and documents of carriers and to provide penalties for the violation of the provision of this act."

Section 1 declares it unlawful for any person, firm, or corporation to deliver, or receive, for shipment, or carry or deliver, to any portion of this state where the sale of intoxicating liquors is prohibited, any such liquor, "except as provided for in this act."

Section 3 declares it unlawful for any railroad or express company, or other common carrier, or any person, firm, or corporation, to carry intoxicating liquor into any territory of this state where the sale of the same is prohibited, "for the purpose of delivering, or to deliver any such intoxicating liquors, to any person, company or corporation," without making and preserving a record of the same, consisting of a statement, in duplicate, one of which is to be sent to the clerk of the court of the parish or district from which, and the other to the clerk of the court of the parish or district to which, the liquor is shipped, and either of which may be used as evidence, "provided,

however, that when intoxicating liquors are shipped from within this state to a point without this state it shall not be necessary to furnish a statement," etc.

Section 4 makes it unlawful for any common carrier, corporation, person, etc., to deliver intoxicating liquor within any territory in this state where the sale of the same is prohibited, to any other person than the consignee, or his agent, authorized in writing, and without taking a written receipt therefor, which receipt is to be sent to the clerk of the court of the parish or district in which the delivery is made, to be used as evidence.

Section 6 declares:

"That it shall be unlawful for any common carrier, person, or corporation to ship, or receive for shipment, or deliver any intoxicating liquor from any point within this state into any territory of this state where the sale of intoxicating liquor is prohibited, \* \* \* without marking on the outside of the package containing such intoxicating liquor, where it can be plainly seen and read, the words, 'This Package Contains Intoxicating Liquor,' and the quantity thereof."

Section 9:

"\* \* \* That nothing in this act shall prohibit any common carrier, or any person, firm or corporation from receiving and shipping to any person, for his own use or that of his family, in one package and at one time, the following:

"1. Not less than one-fifth ( $\frac{1}{5}$ ) of a gallon and not more than one gallon of intoxicating liquor in one shipment.

"2. Not more than one-fourth ( $\frac{1}{4}$ ) of a barrel of beer, or 8 gallons of draught beer or one cask of bottle beer containing 10 dozen pint bottles or 6 dozen quart bottles of beer.

"3. Not more than five (5) gallons of wine," etc.

[1] It will be seen from the foregoing, which sufficiently indicates the purpose and scope of the statute, that neither from its title nor its text can it be inferred that it was any part of that purpose to make it unlawful for a citizen of another state to buy intoxicating liquor from a merchant in Louisiana who is legally authorized to sell it, and to carry the same into such other state, there to be used by himself, or his family, or to be

otherwise disposed of as he may think proper. Whether such acts would contravene the law of Arkansas, the "Webb-Kenyon Act" (Act Cong. March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1916, § 8739]), or any other federal statute is a question which is not here presented for consideration. Counsel for relator have, however, provided us with a certified copy of the opinion and decree of the Supreme Court of Arkansas in a case entitled *Rivard v. State*, 202 S. W. 39, which, as we infer, has been quite recently decided, and in which, construing a statute of 1917, known as the "Bone Dry Law," containing provisions very similar to those contained in our act of 1915, that learned tribunal holds:

"That a person who personally brings intoxicating liquors into the state for himself does not come within the prohibition of the statute," and that, "if he uses them in violation of the law or keeps them for the purpose of selling them after he has brought them into the state, there are other statutes \* \* \* dealing with this phase of the question."

[2] From which we conclude that, in doing as he is conceded to have been doing when arrested the relator herein would not have been amenable to the charge of violating, or intending to violate, the law of Arkansas, any more than he is amenable to the charge of violating the law of Louisiana. The charge itself, we may say, is within the statute upon which the state relies, and the motion to quash was therefore properly overruled; but neither the statements per curiam, made parts of the bills of exception, reserved on the trial, nor the return of the trial judge to the rule nisi herein issued pretend to challenge the statement of the facts as set forth in the motion for new trial, which motion was made part of the bill reserved to the overruling of the same, and which bill, having been signed by the judge, without such challenge, the facts therein alleged are taken to have been conceded; and, that being the case, we are of opinion that

relator. has committed no offense and is entitled to his discharge.

It is therefore ordered that the conviction and sentence herein appealed from be annulled, and the relator discharged.

(79 South. 334)

No. 23097.

STATE v. LARK.

In re LARK.

(June 29, 1918.)

Anderson Lark was convicted of an offense against the liquor laws, and he applies for certiorari and prohibition. Judgment annulled, and relator discharged.

Thomas W. Robertson, of Minden, for applicant.

MONROE, C. J. The party defendant in this case is different, but the facts disclosed, the relief prayed for, and the law applicable thereto are the same, as in the case of "State v. Ad. Block, In re Ad. Block, applying," etc. (No. 23096) 79 South. 332,<sup>1</sup> this day decided. For the reasons assigned in the opinion therein handed down, therefore, it is ordered that the conviction and sentence herein appealed from be annulled, and the relator discharged.

O'NIELL, J., concurs in the decree.

(79 South. 334)

No. 22620.

UNION TANK LINE CO. v. DAY, Sheriff,  
et al.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

1. TAXATION  $\S$  164 — ASSESSMENT OF ROLLING STOCK—"DOING BUSINESS."

A New Jersey tank line company, having a principal office in New York City, whose business is owning, repairing, and leasing tank cars to railroads and others, business of operating cars being that of lessees, and company having no office, place of business, agent, or employé in Louisiana, is not "doing business" in state within Act No. 281 of 1914, § 1, authorizing assessment

<sup>1</sup> Ante, p. 766.

of rolling stock of foreign corporations doing business in state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. TAXATION  $\S$  252 — ASSESSMENT — TAXING DISTRICT.

Property can be assessed only in the taxing district within which it is situated.

3. TAXATION  $\S$  4 — ASSESSMENT — SITUS.

For property with no fixed situs, as rolling stock used on railroads, the Legislature may fix an assessment situs.

4. TAXATION  $\S$  286 — ASSESSMENT OF TANK CARS — SITUS.

The state board of appraisers could not assess as if situated in the parish of East Baton Rouge, tank cars of a tank line company leased to railroads and distributed over the railroads throughout the state; if the cars were assessable at all, the assessment would have had to be made for each parish wherein they happened to be situated, or in each parish for its proportional part of the average whole in the state.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action to annul an assessment by the Union Tank Line Company against Robert B. Day, Sheriff, and others. From judgment for plaintiff, defendants appeal. Affirmed.

A. V. Coco, Atty. Gen., Wylie M. Barrow, Asst. Atty. Gen., John Fred Odom, Dist. Atty., L. D. Beale, City Atty., and A. J. Thomas, all of Baton Rouge (Harry P. Sneed, of New Orleans, of counsel), for appellants. James Legendre and Eugene J. McGivney, both of New Orleans, and Campbell, Harding & Pratt, of New York City, for appellee.

PROVOSTY, J. Plaintiff contests an assessment made of its property for taxation as unauthorized, and, moreover, as irregular, even if authorized.

"An assessment of taxes must be made under authority of a statute and in accordance with its provisions." 37 Cyc. 988. "The statute must not only provide what property shall be taxed, but it must provide methods for the valuation of such property, and clothe some person, officer, or tribunal with power and authority to assess such valuation; and, if the statute

contains no such provisions, it will be insufficient to subject such property to taxation." *State Board of Tax Commissioners v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826. "It is essential to the validity of an assessment that it be made by the officer or other agency authorized by law to make it." 27 A. & E. E. of L. 664. "All property shall be taxed in proportion to its value to be ascertained as directed by law. \* \* \* The Legislature shall provide a system of equality and uniformity in assessments." Const. art. 225.

The law relied on for authority to make the said assessment is the third paragraph of section 1 of Act 281, p. 562, of 1914, which reads as follows:

"That the state board of appraisers, as created by article 226 of the Constitution of 1913, be and are hereby authorized to levy an assessment upon such values as may be fixed by them as fair and just upon all rolling stock of foreign corporations doing business in this state, the same to be proportioned to the total amount of rolling stock of said corporations, upon such basis as may be fixed by the said board, which property is hereby made subject to assessment and taxation under this act, the same as all other property."

There are other laws providing for the assessment of property in this state, but they, admittedly, have no application in the present case, and are not being invoked for sustaining the said assessment.

[1] It will be noted that the rolling stock which the said law authorizes the said board to assess is that of foreign corporations "doing business in this state." Plaintiff is a New Jersey corporation, and has its principal business office in the city of New York, state of New York. Its business consists in owning and keeping in repair and leasing to railroads and others tank cars. Its leases are made in New York, and its rents are paid there. It receives a certain mileage from the railroads over which its tank cars are operated by the lessees; but this is part of the rental, and is paid as such in New York. The business of operating the

cars is entirely that of the lessees. Plaintiff has no office, place of business, agent, or employé in Louisiana. Under these circumstances we must hold that plaintiff is not "doing business" in this state, and that therefore the said law does not confer authority upon said board to make the assessment of its property.

[2-4] The other ground of objection is equally well taken. The property of plaintiff has been assessed as if situated in the parish of East Baton Rouge; whereas, as a matter of fact, it is distributed over the railroads throughout the state. No law that we know of authorizes the assessment and taxation in East Baton Rouge parish of property situated in the other parishes of the state. It goes without saying that property can be assessed only in the taxing district within which it is situated. For property with no fixed situs—and plaintiff's property is of that character—the Legislature may fix an assessment situs (*Marye v. B. & O. R. R. Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94), but this was not done in the present case. Hence if said property was assessable at all by said board the assessment would have had to be made for each parish wherein it happened to be situated, or in each parish for its proportional part of the average whole within the state.

The fact that plaintiff has not established a place of business in the state, or appointed an agent, cannot be made to supply or serve for legislative authority to make the assessment. The necessary legislative authority could be conferred only by the Legislature.

The judgment annulling the assessment is affirmed.

O'NIELL, J., concurs in the decree.

(79 South. 335)

No. 22895.

**BADGER-LOUISIANA LAND CO. v. ESTOPINAL, Sheriff, et al.**

(June 29, 1918.)

*(Syllabus by the Court.)***1. MUNICIPAL BONDS—CONSTITUTIONAL RATIFICATION.**

Article 281 of the Constitution was amended in 1912, in the manner represented in Act No. 132 of that year (page 164); and all bonds issued by any subdivision of the state for the purposes specified in paragraph 1 of that article were declared valid, ratified, and confirmed on certain express conditions.

**2. MUNICIPAL CORPORATIONS §935—CONSTITUTIONAL RATIFICATION—VALIDITY—JURISDICTION OF COURTS.**

A similar ratification was had in the amendment adopted in 1914, as represented in Act No. 192 of that year (page 370); and the courts were therein deprived of jurisdiction to entertain any contest wherein the validity or constitutionality of such bonds was questioned.

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; R. Emmet Hingle, Judge.

Suit by the Badger-Louisiana Land Company against Albert Estopinal, Sheriff of the Parish of St. Bernard, and others, to have certain acreage taxes set aside and to restrain the collection of certain other taxes, in which the Whitney Central Trust Savings Bank intervened. Judgment for defendants, and intervener, and plaintiff appeals. Affirmed.

Frank Wm. Hart and Oliver S. Livaudais, both of New Orleans, for appellant. W. W. Wall, of New Orleans, for appellees sheriff and assessor. W. W. Wall, of New Orleans, N. H. Nunez, of St. Bernard, and J. Blanc Monroe, of New Orleans, for appellee Board of Com'rs. Hall, Monroe & Lemann, of New Orleans, for appellee Whitney-Central Trust & Savings Bank.

SOMMERVILLE, J. Plaintiff appeals from a judgment rejecting his demand for an injunction to prevent the defendant from col-

lecting taxes for the drainage of his lands in St. Bernard parish, and to have declared invalid a 3-cent, a 6-cent and a 16-cent acreage tax for the year 1916, on various grounds.

The validity of the tax referred to and the bonds issued therefor have been before the court on several occasions.

In the case of Board of Commissioners of Bayou Terre Aux Bœufs Drainage District v. Baker, 124 La. 216, 50 South. 16, it was held that the 3-cent acreage tax was legal and binding.

In the later case of Godchaux Co. v. Estopinal, 142 La. 812, 77 South. 640, the validity of the 16-mill acreage tax was upheld.

Plaintiff argues that he is not attacking the bonds issued by the defendant commission which represent the funding of the taxes involved; and he relies upon the case of Shaw v. Board of Commissioners, 138 La. 923, 70 South. 910, wherein it was held that an attack upon the taxes involved in that case did not involve an attack upon the bonds issued by the commission. But the Shaw Case was overruled on that point in the Godchaux Case.

[1, 2] The bonds issued by the defendant commission, and secured by the assessments and taxes herein attacked, have been twice ratified and declared to be valid obligations of the subdivision of the state which issued them. In 1912, by a vote of the people of the state, as appears in Act 132 of 1912, p. 164, the ratification is in these words:

"Where bonds of any subdivision have been heretofore issued for any of the purposes specified in paragraph 1 of this article, and issue has been authorized by the vote of a majority in number and amount of the property taxpayers qualified to vote under the constitution and laws of this state who voted upon the proposition to issue such bonds at an election held for that purpose and where such bonds have been issued and sold by such subdivision for not less than par value thereof, the said bonds or any refund issue bonds or renewal or refunding bonds issued in novation or renewal of bonds issued for said purposes specified in paragraph 1 of article two hundred and eighty-one (281) are hereby validated, ratified and confirmed: Provided that such

bonds did not at the time of their issue exceed ten per centum of the assessed valuation of the property in such subdivision, and such bonds hereby ratified, approved and confirmed shall be deemed to be the valid and incontestible obligations of such subdivision and a tax for the payment of the principal and interest thereof and to create a sinking fund for the redemption shall be levied and collected in the manner and within the limits prescribed by said paragraph 1 of this article. This entire article is to be considered a full grant of power to the subdivisions of the state as set forth therein."

Again in 1914, as appears by Act 192, p. 370, which became an amendment to the Constitution, the ratification of the bonds is in the following words, and the courts were prohibited from entertaining any contest where in their validity or constitutionality was questioned:

"All bonds heretofore issued under and by virtue of this article 291 of the Constitution by the governing authority of any subdivision, which have heretofore not been declared invalid by a judgment of a court of last resort in the state of Louisiana and more than sixty (60) days have elapsed since the promulgation of the proceedings evidencing the issuing of said bonds, are hereby recognized and declared to be valid and existing bonds and obligations of the district or subdivision issuing the same, and no court shall have jurisdiction to entertain any contest where in their validity or constitutionality is questioned."

The people of the state by their vote, had the right to ratify bonds issued by a subdivision of the state and to declare them valid obligations, and to compel the payment of all just debts owing by municipalities and other similar bodies, even if the evidences of indebtedness were not in all respects regular, where it is shown that such subdivision of the state had received compensation for such evidences of indebtedness.

Plaintiff's complaint that it has been deprived of a remedy or right of action by the amendment of the Constitution in 1914 is without merit. The bonds issued by the defendant had been issued more than 60 days before the adoption of the amendment, and they were therefore embraced within its terms. Those bonds were declared valid ob-

ligations of the defendant commission, and they cannot be attacked directly or indirectly by plaintiff. The amendment did not purport to affect any bonds where the proceedings evidencing such issue showed that the bonds were issued within 60 days of the date of the adoption of the amendment.

The provision that "no court shall have jurisdiction to entertain any contest wherein their validity or constitutionality is questioned," referring to the bonds mentioned, was adopted by the people, doubtless, in the interest of progress and for the making of bonds certain and stable in the money markets of the world.

The judgment appealed from is affirmed.

O'NIELL, J., concurs in the decree. MONROE, C. J., takes no part.

(79 South. 401)

No. 22962.

**CITY OF SHREVEPORT v. BOARD OF  
COM'RS OF CADDO LEVEE DIST.**

(June 29, 1918.)

*(Syllabus by the Court.)*

**1. DRAINS ~~6~~18—INTERFERENCE WITH MUNICIPAL AFFAIRS—STATUTE.**

The city of Shreveport is expressly excluded from the territorial limits within which the Caddo levee board is authorized to exercise its functions, and the board has no authority to invade that city and interfere with the municipal officers in the administration of its affairs.

**2. DRAINS ~~6~~41—LEVEE BOARD—AUTHORITY TO CUT DRAINAGE CHANNELS—STATUTE.**

The Caddo levee board derives no authority from Act No. 61 of 1904 to cut new drainage channels, and, still less, to divert the water falling upon many thousands of acres of land from its natural drain and carry it, by means of a new channel, through a city of 40,000 inhabitants.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Suit for injunction by City of Shreveport against the Board of Commissioners of Cad-

do Levee District. Judgment for plaintiff, and defendant appeals. Affirmed.

L. C. Blanchard, Dist. Atty., and William C. Barnette, Sp. Counsel, both of Shreveport, for appellant. Lewell C. Butler, City Atty., of Shreveport, for appellee.

#### Statement of the Case.

MONROE, C. J. The defendant board, in the discharge of the duties imposed upon it, deemed it advisable to close the mouth of Twelve Mile bayou, a navigable stream which empties into Red river at a point about five miles above Shreveport. It was necessary, however, for it to obtain the consent of the Secretary of War, and, with a view of obtaining that consent, it proposed to divert the waters of the bayou by means of a navigable canal, through Cross Lake and Cross bayou, by way of "The Pass" and "Bonner's ditch," into the Red river at Shreveport, which proposition was accepted upon certain conditions, among which were the following:

"1. That it is to be understood that this authority does not give any property rights either in real estate or material, or any exclusive privilege; that it does not authorize any injury to private property or invasion of private right, or any infringement of state law or regulations, nor does it obviate the necessity of state assent to the work authorized, as it merely expresses the assent of the federal government, so far as concerns the public right of navigation.

"8. That all bridges crossing the waterways between Twelve Mile bayou and Red river shall be so changed, at the expense of the grantee or other local interests, as to provide suitable passage for all boats using the waterway."

It is admitted that the work of cutting the canal from Twelve Mile bayou to Cross bayou, a distance of 4.3 miles, has been completed, or is nearing completion, and that defendant purposes to make use of Cross bayou for a distance of 1.9 miles from its mouth, up to which point it is shown to have been, at one time, navigable, though not within the past 20 or 25 years. It is also shown that, at about that point, the city

of Shreveport has built a bridge, as part, or at the foot, of one of its principal streets; that the intake pipe, whereby its inhabitants are supplied with water, crosses the stream there; and that defendant was about removing those obstructions when it was restrained from so doing by a writ of injunction issued from the district court.

Capt. Taylor, the president of the defendant board, was interrogated, and replied, concerning the present situation as follows:

"2. Now, Capt. Taylor, the levee board, in removing these obstructions, it was their purpose to provide, as I understand, another bridge and another waterworks pipe for the city, leaving the question as to who should pay for this, open for their consideration; that is a fact? A. This work had to be done; we asked the city, the police jury, and the T. & P. to remove these obstructions, and they refused to do it, and we agreed to have a friendly suit, but would go on and remove the obstructions and let the court say who should pay for it."

It further appears from the testimony of Capt. Taylor that defendant has completed its levee system on the west bank of Red river from the Arkansas line to Twelve Mile bayou, and now proposes, by building across the mouth of that bayou, to continue the levee to Cross bayou, thereby, as he says, redeeming 40,000, or 50,000 acres of land. But, in order to accomplish that purpose, it must comply with the requirements of the Secretary of War by furnishing a channel, for purposes of navigation, leading into Red river, as a substitute for that which is to be closed, and that channel, as we understand the situation, will impose upon Cross bayou the burden of carrying the drainage heretofore carried by Twelve Mile bayou, in addition to that imposed on it by nature. There was judgment in the district court for plaintiff, and defendant has appealed.

#### Opinion.

[1] We take it to be conceded that the bridge and water pipe, about which this controversy has arisen, are entirely within the



corporate limits of the city of Shreveport, since it is so positively alleged in the petition, and the case has been argued upon that theory, which being true, we are at a loss to understand whence the defendant derives its authority to meddle with either of those improvements, since Act 74 of 1892, whereby it was called into existence, in its first section (amended and re-enacted by Act 160 of 1900) delimits the territory within which it was authorized to exercise its functions, and in that connection uses the words, "not including the city of Shreveport," which harmonize with the language of the legislative charter of the city of Shreveport (Act 158 of 1898), which confers upon that corporation the general and special powers usual in such cases, including the power—

"to regulate and make improvements in the streets, alleys, public squares, wharves and other public property. \* \* \*

"To regulate the proportion and to make and repair all common sewers, drains, canals, public roads, levees, dykes, causeways and bridges. \* \* \*

"For cleaning of the banks of the river or other navigable streams within the limits of the city, for the reopening of such amount of natural drains as have been obstructed \* \* \* or opening, or filling up of any water course which is not navigable."

Section 23 of the act of 1898 declares that:

The street commissioner shall have, under the direction of the mayor and council, "general superintendence of all matters relating to the streets; \* \* \* the construction and repairing of bridges and crossings and drainage of the city; the superintendence of the waterworks," etc.

The grants thus mentioned include the power to open a natural drain within the corporate limits, such as Cross bayou, and to build, maintain, and regulate a bridge which spans it and forms part of a highway over which many thousands of persons enter and leave the city annually, and we should be surprised to learn that such power had been withdrawn from the municipal authorities and lodged in the levee board, even though, for levee purposes, the locus in quo were

within the territorial jurisdiction of the board.

[2] If we are correct in the view thus stated, defendant, having no capacity to move beyond the limits within which, by the law of its creation, it is established, has no warrant to assume control of affairs which the state, as the author of both, has intrusted to another corporation; nor does it matter whether the bridge and pipe which it purposes to move obstruct a navigable or a nonnavigable stream, since defendant has not been endowed with authority or capacity to invade the city of Shreveport and execute its own ex parte judgment concerning the legality of the acts of that corporation. It is confined, as is the city of Shreveport, to its own balliwick. In the case of *Petit Anse Coteau Drainage Dist. v. Iberia & V. Railroad Co.*, 124 La. 502, 50 South. 512, to which we are referred by counsel on both sides, the plaintiff was acting within the powers conferred upon it, and within the territory designated by law for the exercise of those powers, which were conferred on no other state agency; and it was there held that such corporations, i. e., corporations established to attend to the drainage of particular districts, were authorized to enter upon lands therein, through which the natural drains pass, for the purpose of doing the work necessary to render and keep them efficient, but it was also held that, where new drains were to be cut, they must expropriate and pay for the property required for that purpose. The defendant now before the court was not incorporated for drainage purposes, and, so far as we are informed, has not been invested with the power conferred on drainage corporations, save to the extent of the grant contained in Act 61 of 1904, which is very general in its character, and, in our opinion, falls far short of authorizing defendant to wrest from the city of Shreveport the specific authority confer-

red upon it with respect to drainage within its corporate limits. Moreover, the act of 1904 contains no grant of authority for the cutting of new channels, nor does it contain any suggestion of a grant which would authorize a levee board to divert the water falling upon 40,000 or 50,000 acres of land from their natural drain and carry them, by an artificial channel, through a city of 40,000 inhabitants. It may be that the proposed scheme, when put in operation, will prove satisfactory to all concerned. We know nothing, and have no opinion to express, about that. But we find no law for it. The judgment appealed from is therefore affirmed.

PROVOSTY, J., concurs in the decree.

(79 South. 403)

No. 21373.

NELSON v. BARBER.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

CONTRACTS §10(4)—REQUISITES—MUTUALITY—EFFECT.

A proposition by a baker accepted by a grocer, to deliver to the latter whatever bread he may require for 24 stores (for the business of which bread is absolutely necessary), for one year, at say, 2½ cents a loaf, of fixed weight and standard quality, the grocer to supply standing orders for same, subject to revision upon due notice would not be objectionable, as a contract, for lack of mutuality; but, where there is injected a condition that the grocer may sell another make of bread at not less than 4 cents a loaf, he is left at liberty to buy from others than the baker all the bread required for his stores, provided he sells it at not less than 4 cents, and is bound to buy from the baker only such bread as he may choose to sell at a lower price. In other words, it is left entirely to the grocer to determine, as his interest or caprice may suggest, whether he will buy any bread from the baker and, there being no mutuality of obligation, there is no contract.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Nelson O. Nelson against Abraham Barber. Exception of no cause of action maintained and suit dismissed, and plaintiff appeals. Affirmed.

Titche & Rogers, of New Orleans, for appellant. Edgar M. Cahn, of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. "On July 7, 1914, defendant, Barber, and plaintiff, Nelson, entered into a written agreement respecting the handling by Nelson of the bread manufactured by Barber. The contract was in form of a letter addressed by Barber to Nelson and accepted by Nelson. Following is a copy of the letter which, with the acceptance, constitutes the contract, viz.:

"New Orleans, La., July 7, 1914.

"Nelson Co., City—Dear Sirs: I propose to supply you with whatever bread you may require for your retail stores for the period of one year with the privilege of renewal for a second year at the price of 2½ cents per loaf, less 5 per cent. discount for cash. The bread is to be of standard quality and no loaf to weigh less than 14 ounces. I will take back stale bread not exceeding an average of 5 per cent. on the total.

"The bread will be wrapped in compliance with city ordinance. You are to supply me with standing orders, subject to revision upon due notice, and I will deliver them complete at the regular hours. This offer applies to twenty-four of your stores, and as many more as you choose to add. You are privileged to sell another make of bread at not less than 4 cents a loaf. Either of us shall be liable for actual provable damages for failure to carry out the agreement.

"Yours truly, [Signed] A. Barber.

"Accepted: Nelson Co., by N. O. Nelson."

"After the parties had complied with the contract for the first six months, to wit, until January 19, 1915, defendant, Barber, refused to continue the further execution thereof, and refused to make and deliver any more bread under the agreement.

"Thereupon, plaintiff brought this suit, alleging the contract, the written evidence of which he annexed to his petition; alleged that Barber immediately upon the execution

proceeded to carry out the contract, and delivered to plaintiff the bread, required by him, for which plaintiff promptly paid as he agreed to do in said contract. That, on January 19, 1915, defendant refused to make any further deliveries under the agreement and declared to plaintiff that he would not carry out the contract, assigning as a reason for his conduct that he was losing too much money on same. And that, on January 20, 1915, notwithstanding due demand, he continued and persisted in his refusal.

"That thereupon plaintiff endeavored to procure bread from other sources, but was unable to do so, for less than  $3\frac{1}{2}$  cents per loaf of fourteen ounces (as compared with  $2\frac{1}{2}$  cents, the contract price).

"That plaintiff conducts a great number of retail grocery stores in this city, daily sells a large quantity of bread to his customers, and that bread is absolutely necessary to him in the conduct of his said business.

"That plaintiff sells daily not fewer than 6,500 loaves a day, and the difference between the contract price and the price plaintiff is compelled to pay by reason of the default of Barber will amount to \$14,405 between the date of said default (January 20, 1915) and the end of the life of said contract, to wit, July 6, 1915, which is the amount of loss and damage sustained by plaintiff by reason of the default of said Barber.

"That the price of flour in the New Orleans market and other markets of the world has greatly advanced between the date of the contract and the date of default, and plaintiff cannot procure bread at a price lower than  $3\frac{1}{2}$  cents a loaf.

"The prayer is for judgment accordingly for \$14,405.

"Defendant filed exceptions:

"First. That the petition is too vague and indefinite.

"Second. That the demand is premature.

"Third. That plaintiff has mistaken his

remedy and cannot proceed in the manner and form attempted.

"Fourth. That plaintiff's petition presents inconsistent allegations.

"Fifth. No right or cause of action.

"There was judgment maintaining the exception of no cause of action and dismissing the suit.

"Plaintiff appealed."

#### Specification of Errors.

"(1) The court erred in holding that the contract was unenforceable because lacking in mutuality.

"(2) The court erred in maintaining the defendant's exception of no cause of action."

#### Opinion.

The difference between the acceptance of a proposition to deliver so much bread, of a certain grade, within a time fixed, as the acceptor may want, or require, and the acceptance of a proposition to deliver such bread, within the time fixed, as the acceptor may require for the purposes of an established business to which it is essential, is obvious, and the principle upon which it is founded, well recognized. In the first case, the acceptor does not bind himself to want, require, or take any bread, and hence there is no consideration for the obligation, tendered by the proposition, to deliver bread. In the second case, the acceptor binds himself to require and take all the bread necessary to supply the demands of an established business to which bread is an essential (in this instance, it is written in the accepted proposition, "You are to supply me with standing orders, for the loaves required." etc.), and the acceptor also precludes himself from obtaining the required bread from any one else than the author of the proposition, thereby incurring obligations which are to be regarded as equivalents, and consideration, for those tendered by the proposition, and as,

with them, constituting a commutative contract. C. C. arts. 1768, 1770; *Smith v. Morse*, 20 La. Ann. 220; *Beck v. Fleitas*, 37 La. Ann. 492; *Landéche v. Sarpy*, 37 La. Ann. 836; *Lima, etc., Co. v. National, etc., Co.*, 11 L. R. A. (N. S.) 713, and note page 717; 9 Cyc. 329.

In the instant case, however, there is injected into the accepted proposition, the following, "You are privileged to sell another make of bread at not less than 4 cents a loaf," from the construing of which, with the other conditions of the proposition, it follows that plaintiff is left at liberty to buy from others than defendant all the bread required for his stores, provided he sells it at not less than four cents a loaf, and hence is bound to buy from defendant only such bread as he may choose to sell for a lower price. In other words, it is left entirely to him to determine, as his interest or caprice may suggest, whether he will take any bread from defendant. Whether it would be to his interest to demand not less than four cents at all of his stores, or four cents at some, and less, or more, at others, we are unable to say; nor does it matter for the purposes of this case. The facts remain that the accepted proposition places him under no obligation to buy bread from defendant, if he chooses the alternative, which it affords him, of buying from some one else upon the conditions stated. Nor, yet, does it matter that, during the six months of their dealing with each other, plaintiff may not have availed himself of that alternative, since he was at liberty so to do at any time. It may be remarked that it is not alleged that the bread that plaintiff was privileged to buy from others and sell for four cents differed in quality from that to be delivered by defendant.

We therefore conclude that there is no error in the judgment appealed from, and it is, accordingly,

Affirmed.

(79 South. 405)

No. 21569.

BURKE v. WERLEIN et al.

(June 29, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §317—MUNICIPAL CORPORATIONS §783 — EXCAVATION IN SIDEWALK—PERSONAL INJURY — LIABILITY OF OWNER—NUISANCE.

An excavation in a public sidewalk is intrinsically dangerous, and is a nuisance, and one who causes it to be made owes an absolute duty to protect the public from injury that may result therefrom, and cannot escape liability for such injury by showing that the excavation was made by a person who, though engaged by him so to do, acted as an independent contractor.

2. PRINCIPAL AND AGENT §159(2) — TORTS OF AGENT—LIABILITY.

An agent is liable for his own torts in like manner as other persons; his liability being neither increased nor decreased by the fact of his agency.

(Additional Syllabus by Editorial Staff.)

3. DAMAGES §131(2)—PERSONAL INJURY — AMOUNT.

Where injury to plaintiff's foot was not permanent, and his physical suffering was not continuous or of long duration at any time, and his detention from business was slight, and he suffered no pecuniary loss, a verdict of \$750 was adequate.

O'Niell, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by Thomas J. Burke against Philip Werlein and James Geary. Judgment for defendants, dismissing the suit after a trial on the merits, and plaintiff appeals. Judgment reversed, and judgment rendered in favor of plaintiff and against defendants in solido.

Roger Meunier, of New Orleans, for appellant. Merrick, Gensler & Schwarz, of New Orleans, for appellee estate of Philip Werlein. P. M. Milner, of New Orleans, for appellee Geary.

Statement of the Case.

MONROE, C. J. This is a suit against an alleged property owner and a contractor em-

ployed by him for damages for personal injuries said to have been sustained by plaintiff by reason of the alleged negligence of the defendants. The suit was originally dismissed upon exceptions, but upon appeal to this court that ruling was reversed, and it was remanded. 130 La. 439, 58 South. 140. It has now come up on appeal from a judgment of dismissal, after a trial on the merits.

Werlein, the alleged property owner, for answer denied that he was the owner of the lots in front of which a certain excavation was made; admitted that he entered into a contract with Geary, his codefendant, whereby the latter was to erect buildings on the lots, but alleged that Geary was an independent contractor, who was to do his work under the supervision of an architect, who was also an independent contractor; that the contract did not contemplate any such excavation; and that the excavation in question, if made, was the work of the sewerage and water board, and was done without his knowledge or consent. He also pleaded contributory negligence on the part of plaintiff. The denial of responsibility on the ground that he was not the owner of the lots was, however, abandoned, and the defense relied on was, and is, that the excavation was the work of the sewerage and water board; that plaintiff was not so badly injured as he alleges; and that his injury was attributable to his own negligence. Geary pleaded the general denial.

It was shown on the trial that Werlein entered into a contract in his own name with Geary, whereby the latter agreed to erect buildings upon three lots on Bienville street standing in Werlein's name, two of which adjoin each other, with the third separated from them by a distance of perhaps 60 feet, the understanding being that the building on the separate lot was to be hurried to completion in advance of the others. (There appears to have been some little confusion at one time about the municipal numbers, but

for convenience of reference we shall take 517 and 519 as the correct numbers of the two lots which adjoin each other.) On June 4, 1909, about 3:30 o'clock p. m., plaintiff, who was under 40 years of age, weighed 240 pounds, and was in full possession of his faculties, mental and physical, was walking with a friend on the banquette in front of lots 517 and 519, on the way to his office. The bricks of the banquette had been taken up, leaving a more or less uneven surface of earth, which was aggravated by the fact that there was an excavation in front of one of the lots, from which or from some other source loose earth had been removed and piled into something of a ridge upon the curb side of the banquette, thereby narrowing the passageway and leaving, between the ridge and the wall, in course of construction, no more room than was required for the two men to walk abreast of each other. The excavation was about  $2\frac{1}{2}$  feet from the wall, 3 or 4 feet deep, and was covered with planks, which had an appearance of stability, and, as they were immediately in the path of the plaintiff, who was walking on that side of the banquette, he assumed that they had been placed there to serve as a bridge, and stepped on one of them in order to get across the excavation. The plank, however, gave way under his weight, bending and, perhaps, partly breaking and tilting, so that his left leg went down into the excavation and was badly lacerated and scraped upon the inside from the knee up, while his right leg was held in position by the upturned edge of the plank, and, as his left foot did not reach the bottom of the excavation, he suffered other injuries which were painful, at the time and afterwards, and disabled him considerably for several months; in fact he was still complaining of them after the lapse of 2 years or more. He incurred an indebtedness of \$175 to his physician, and spent over \$28 for drugs and appliances.

Under the specifications of his contract,

Geary was required to do the inside plumbing; that is to say, he was to install all the plumbing work that was required inside of the buildings and bring the pipes (meaning sewerage and water pipes) to a point under the banquettes 2½ or 3 feet outside of the front wall, or foundation, where they were to be connected with pipes leading from the mains to be put in and connected by the sewerage and water board. The inside plumbing was sublet by Geary to the Southern Plumbing Company, of which Julius Loeffler was president and, perhaps, the whole company, and, when that work was completed, the excavation into which plaintiff was precipitated was covered, and probably is now covered, with a lid, or cap, bearing his name. Apart from that, the records of the sewerage and water board and the testimony of its employés are conclusive to the effect that its work in making connections was done at the point, 2½ feet from the wall, to which Loeffler had brought the pipes from the inside, and that the hole into which plaintiff's leg dropped was there at that time. In fact, as we understand the testimony, the board does not undertake to make its connections with premises until there is something with which to connect; hence the inside plumbing is always done first. During the trial Geary was examined as a witness upon three occasions. Upon the first, he said nothing as to the digging of the hole in question; upon the second, he was asked whether Loeffler's men had dug it, and he replied that he did not know; upon the third, the judge not being present, he testified that he knew that the hole had been dug by the sewerage and water board people, because he had been so informed, and he "saw the hole after it was dug." He did not, however, call Loeffler or any of his men. Two other witnesses, called for defendants, gave testimony to the effect that, at a time when the buildings 517 and 519 were not equipped with inside plumbing,

and there was nothing for the sewerage and water board to connect with, its men came there and dug a ditch across the banquettes, though the only place where a connection could have been made was at the single building 60 feet away. The sewerage and water board people positively deny that any such thing happened, and the records of the board corroborate their testimony, whilst that of the other witnesses is uncorroborated, and in the light of the other testimony and all the circumstances incredible.

### Opinion.

In ruling upon the exceptions of misjoinder of defendants and no cause of action, when this case was here on the previous occasion, we expressed the view that:

"One who causes an excavation to be made in a sidewalk, and covered with boards which invite a pedestrian to walk on them, but which break beneath his weight, precipitating him into the excavation and injuring him, and one who actually does the things mentioned, may be held liable, in solido, to the person injured." *Burke v. Werlein et al.*, 130 La. 439, 58 South. 140.

We now find that the facts, which were then merely alleged, have been established by proof, and we have but little to add to the view thus expressed.

[1, 2] The authorities are practically unanimous to the effect that an excavation in a public sidewalk is intrinsically dangerous, and is a nuisance; that one who causes it to be made, equally with the one who makes it, owes the absolute duty to protect the public from injury that may result therefrom; and that the one who causes it to be made cannot escape liability for such injury by showing that the one who has made it was engaged so to do as an independent contractor.

"The general rule," says Judge Dillon, referring to the rule that the principle of respondeat superior does not \* \* \* extend to cases of independent contracts, where the party for whom the work is done is not the immediate superior of those guilty of the wrongful acts and has no choice in the selection of workmen and no con-

trol over the manner of doing the work under the contracts, "is stated in the preceding section, but it is important to bear in mind that it does not apply where the contract directly requires the performance of a work intrinsically dangerous however skillfully performed. In such a case the party authorizing such a work is justly regarded as the author of the mischief resulting from it whether he does the work himself or lets it out by contract." Dill. Mun. Corp. (4th Ed.) vol. 2, § 1029.

See, also, Elliott on Roads and Streets (3d Ed.) vol. 2, § 815; Anderson v. Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119, and note; Cameron Mill & E. Co. v. Anderson, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. (N. S.) 198; McCarrier v. Hollister, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695; Rock v. Am. Const. Co., 120 La. 831, 45 South. 741, 14 L. R. A. (N. S.) 653; McCormack v. Robin, 126 La. 594, 52 South. 779, 139 Am. St. Rep. 549; Allen v. Town of Minden, 127 La. 403, 53 South. 666.

"An agent is liable to third persons for his own torts in like manner as other persons; his liability being neither increased nor decreased by the fact of his agency." 2 C. J. verbo Agency, pp. 824, 826; Camp v. Church Wardens, 7 La. Ann. 321; Delaney v. Rochereau & Co., 34 La. Ann. 1128, 44 Am. Rep. 456; Englert v. N. O. R. & L. Co., 128 La. 485, 54 South. 963.

[3] The evidence is rather conclusive to the effect that the injuries sustained by plaintiff are not permanent; his physical suffering does not appear to have been continuous or of long duration at any one time, and his detention from his business was measured by days, rather than weeks, and is not shown to have occasioned any pecuniary loss. We, therefore, conclude that \$750 will sufficiently compensate the injury and expense to which he has been subjected.

It is accordingly adjudged and decreed that the judgment appealed from be set aside, and that there now be judgment in favor of plaintiff and against the defendants, the succession of Philip Werlein, herein represented by Mrs. Elizabeth Werlein, natural tutrix, administering the same, and James Geary, in

solido, in the sum of \$750, with legal interest thereon from the date of this judgment, and all costs.

O'NIELL, J., dissents.

(79 South. 407)

No. 20808.

SHREVEPORT WINDOW GLASS CO. v.  
RAILROAD COMMISSION OF  
LOUISIANA.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

On Rehearing.

1. CARRIERS  $\S$  18(1)—RATE RULE OF RAILROAD COMMISSION—GROUNDS FOR ABROGATION.

The desires and dissatisfaction of a shipper with a rate rule of the Railroad Commission of the state are no grounds for abrogation of the rule.

2. CARRIERS  $\S$  18(3)—RAILROAD COMMISSION—SUIT TO SET ASIDE ORDER—LIMITATION.

By Act No. 171 of 1908, no suit to set aside, change, or alter orders of the Railroad Commission shall be entertained unless filed within three months after the order is made.

3. CARRIERS  $\S$  18(2)—RAILROAD COMMISSION—APPELLATE JURISDICTION OF COURTS.

No law confers on the courts appellate jurisdiction over the rulings of the Railroad Commission fixing rates.

4. MANDAMUS  $\S$  81 — CONTROL OF DISCRETION OF RAILROAD COMMISSION—STATUTES.

Since the law which confers on the Railroad Commission authority to penalize railroads (Act No. 175 of 1912) leaves the matter to the discretion of the commission, such discretion of a judicial or quasi judicial tribunal cannot be controlled by mandamus.

5. CARRIERS  $\S$  18(1)—RAILROAD COMMISSION—REVIEW OF RULES — INTEREST IN CONTROVERSY.

In any change that may be demanded to be made in its rules, the Railroad Commission has a real interest that may serve as a basis for it to stand in judgment, but in a question of the proper interpretation of its former rules, whether separately or in conjunction with any judgment, the commission is without interest, and the question is moot.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Suit by the Shreveport Window Glass Company against the Railroad Commission of Louisiana. From a judgment dismissing the suit, plaintiff appeals. Affirmed.

Roberts, Roberts & Johnson, of Minden, for appellant. W. M. Barrow, Asst. Atty. Gen., for appellee.

PROVOSTY, J. On certain through shipments from New Orleans to Shreveport the Louisiana Railway & Navigation railroad, a through line between said two points, charged plaintiff freight in accordance with the rates fixed by the order No. 1222 of the Railroad Commission.

At the time said shipments were made the said order 1222 had been annulled, by judgment of court, in so far as applying to the Texas & Pacific Railroad, in a suit brought by a shipper on the latter railroad against it and said commission, for the reason that the rates therein fixed were excessive, and the pre-existing lower rates had been re-established for the latter railroad.

Discovering this, plaintiff contended that, in view of said judgment and of rule 55G of said commission, shippers on the Louisiana Railway & Navigation road were entitled to the benefit of the rates thus established for the Texas & Pacific, the said rule 55G reading as follows:

"Where there are two or more lines between any two connecting points in Louisiana having through connections, the lowest established rate between such points shall be charged by through lines accepting freight for transportation between said points."

The Louisiana Railway & Navigation Railroad refusing to be bound by said judgment, as not having been a party to the suit in which it was rendered, and therefore refusing to make restitution of the alleged overcharges, plaintiff lodged a complaint against

it with said commission, asking that it be ordered to make said restitution, and be penalized for violation of said rule 55G.

The commission took the same view as the railroad had done, and, in order to clarify the situation, adopted an amendment to said rule 55G reading as follows:

"No line, however, shall be compelled to protect the rate of another line, provided the shipper is notified by the agent in writing at the time the shipment is tendered of its unwillingness to do so."

This amendment is known as order No. 1869.

In the present suit plaintiff asks that the said commission be ordered to show cause why its said ruling rejecting the said complaint should not be set aside, and the right of the plaintiff to the rate fixed by said judgment for the Texas & Pacific should not be established and perpetuated; why it should not penalize said Louisiana Railway & Navigation for violation of said rule 55G; and, finally, why said order 1869 should not be abrogated, and said rule 55G affirmed as it existed prior to said amendment.

The only grounds alleged for the abrogation of said amendment are stated in the petition as follows:

"That the effect of order No. 1869 is to destroy and nullify the effectiveness of rule 55G to the prejudice of petitioner and other shippers, and petitioner shows that it is dissatisfied with said order, and desires that the same be ordered abrogated."

[1, 2] The desires and dissatisfaction of the petitioner are, of course, no grounds; and it will be observed that said amendment is not alleged to be unreasonable, or that its effect will be to subject the plaintiff to excessive freight rates, but only that it will prejudice the plaintiff, by, we suppose, establishing for plaintiff rates which, though higher than those established for the Texas & Pacific, yet are not alleged to be unjust or unfair. But there is a peremptory reason why this demand cannot be entertained. By Act 171, p.



230, of 1908, no suit to set aside, change, alter, or modify the orders of the Railroad Commission shall be thereafter entertained unless filed within three months after any such order is made. The said order was made on May 28, 1913, and this suit was filed on October 17, 1913, more than three months after the making of the order.

[3, 4] The demands that the commission show cause why its ruling rejecting plaintiff's complaint should not be set aside and why it should not penalize the railroad are in the nature of appeals to the courts from the decisions of the commission, or in the nature of an application for a writ of mandamus to compel the commission to reverse its decisions in said matters, and decide these matters differently. No law that we know of grants a right of appeal to the courts from such decisions of the commission. The law which confers upon the commission authority to penalize railroads (Act 175, p. 318, of 1912) leaves the matter to the discretion of the commission; and, of course, the discretion of an officer, especially of a judicial, or quasi judicial, tribunal, cannot be controlled by mandamus. *State ex rel. N. O. & C. R. L. & P. Co. v. St. Paul*, 110 La. 722, 34 South. 750; *State ex rel. Glancey v. St. Paul*, 113 La. 1066, 37 South. 972; *State v. Board of Liquidation*, 42 La. Ann. 647, 7 South. 706, 8 South. 577; *State v. Police Board of N. O.*, 51 La. Ann. 941, 25 South. 935; *Brown v. Dupuy*, 130 La. 205, 57 South. 890.

By the said amendment No. 1869 the rates which plaintiff contends were established by the judgment of court in the Texas & Pacific case were changed. The very fact of this change is the reason of plaintiff for desiring that said amendment should be abrogated. In so far, therefore, as relates to the time from and after the adoption of said amendment the demand that the rates established by said judgment be established and perpetuated as to the Louisiana Railway & Navigation is but a renewal or repetition, in another

form, of the demand that said amendment be abrogated. So long as said amendment stands, fixing different rates from those fixed by the said judgment in the Texas & Pacific case, it is impossible for the court to perpetuate the rates fixed by said judgment. And, as already seen, the court is powerless to abrogate that amendment. The demand for the perpetuation of said Texas & Pacific rates cannot therefore be granted.

[5] In so far as relates to the time prior to the adoption of said amendment, the rates that must govern are those established by the rules of the commission as then existing. For this prior time, therefore, the demand is not one for the establishment of a rate, but for the interpretation of the legal situation as it then existed under the rules of the commission, or, in other words, for the ascertainment of what were the proper rates to be charged at that time. Now, let us suppose that this court agreed with the plaintiff as to what these rates were; what could this court do in the matter? It could not order the commission to reverse its said rulings; for that would be to exercise appellate jurisdiction over such rulings; and, as already seen, no law confers upon the courts such appellate jurisdiction. It could not order the commission to penalize the Louisiana Railway & Navigation railroad; for that would be to control the discretion of the commission in that matter, and, as already seen, the courts cannot do this. What could the court do? The only answer is, nothing. So far as the present suit is concerned, therefore, that question is a mere moot one. It can be of interest only in any suit the plaintiff, or other similarly situated shippers, might bring against the railroads for reimbursement of alleged overcharges. The only parties to the present suit are the commission and the plaintiff. In any change that may be demanded to be made in its rules the commission has an interest such as may serve as a basis for it to stand in judgment; but in the question of

the proper interpretation to be placed upon its former rules, whether separately or in conjunction with any judgments of court, the commission is utterly without practical interest.

The judgment dismissing plaintiff's suit is therefore affirmed.

(79 South. 409)

No. 22901.

Succession of MANION.

(May 27, 1918.)

(Syllabus by the Court.)

1. PARTITION  $\S$ 44 — PREMATURE DEMAND FOR PARTITION—DISMISSAL.

Where a succession is under administration, and there are major and minor heirs and creditors, a demand, by one of the major heirs, opposed by the others and by the minors, for a partition, is properly dismissed as premature.

2. WILLS  $\S$ 225—REGISTRY AND EXECUTION—SUIT ATTACKING VALIDITY OF DISPOSITION—CONDITIONS PRECEDENT.

An order for the registry and execution of a will, made without citation or hearing of, or issue joined with, parties in interest, and known as the "common," as contradistinguished for the "solemn," form of probate, is merely preliminary and tentative, and it is not necessary that a direct action to annul it should be brought, as a condition precedent to a suit in the same court, to which all parties in interest are cited, attacking the validity of particular dispositions of the will which was the subject of such order.

3. WILLS  $\S$ 476—"CODICIL."

The codicil is embedded in our system of law, and, having been freed from the trammels which bound it under the definition contained in the Code of 1808, art. 83, is not here different from the codicil which is known elsewhere and defined as "an addition or qualification to a will and a part of the will."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Codicil.]

4. WILLS  $\S$ 585(1) — LEGACY — EXTRA PORTION—COLLATION.

Where a testator leaves the disposable portion of his estate to a particular heir declaring that he does not intend such "extra portion" to compensate the legatee for his services as executor, such declaration fixes the status of the

legacy as an extra portion, not intended to be collated.

5. WILLS  $\S$ 649 — DIVISION OF EFFECTS — CONSTRUCTION OF STATUTE.

Article 1300 of the Civil Code, which authorizes a "donor or testator" to order that the effects "given or bequeathed" by him shall not be divided within a maximum period of five years, can have no application to the *légitime* of forced heirs; for even though it may devolve upon them only upon the death of the testator, and his will may contain words of bequest with reference to it, the paramount title comes from the law, and the bequest is merely an acquiescence in that which the law ordains.

6. COMMISSIONS—RIGHTS OF FORCED HEIRS.

In no case can the commission allowed the testamentary executor affect the *légitime* reserved to the forced heirs of the testator. Civ. Code, art. 1687.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Petition by Martin H. Manion, one of the named executors in the will of Martin Manion, deceased, that the will and codicil be registered and executed and that he be confirmed as executor, and authorized to take an inventory on which an order to that effect was made, with suit by John E. Manion for judgment of partition and for other relief, and pending exceptions of prematurity and no cause of action, the executor filed a provisional account, to which John E. Manion and another filed oppositions and a prayer for a partition, etc. From a judgment maintaining exceptions to the suit first brought, and from a judgment dismissing the oppositions, John E. Manion appeals. Judgments appealed from affirmed in part and reversed in part and case remanded.

Dart, Kernan & Dart, of New Orleans, for appellant John E. Manion. Meyer S. Dreifus, of New Orleans, for appellees Martin H. Manion, Walter J. Manion, Mary Martha Manion, and William J. Manion, minors, Martha Louise Penn, widow of William J. Manion, Catherine M. Manion, wife of John M. Burgess, and Martin H. Manion, testamentary executor.

## Statement of the Case.

MONROE, C. J. The decedent died on January 27, 1917, leaving an estate in New Orleans, three sons and two daughters, all of whom had attained majority, and two instruments, written, dated, and signed by him, the one being his last will and the other a codicil thereto. Those instruments (so far as they need be here quoted) read as follows:

"New Orleans, Dec. 31, 1915.

" \* \* \* I give and bequeath to my sons William J. Manion and Martin H. Manion the disposable portion of my estate that I am permitted by law to dispose of by last will at the time of my death. The balance of my estate I desire to be equidly divided between my children who survive me. I desire that my estate shall not be divided or partitioned until five years after my death. I appoint my sons Martin H. Manion and William J. Manion joint executors of my estate, with seizin and without bond. If either should die before me, I desire that the survivor shall act alone. If both should die before me, I appoint the Citizens' Bank & Trust Co. of Louisiana executor, with seizin and without bond. The extra portion that I give to my sons Martin H. Manion and William J. Manion is not to be in compensation for their services as executors. Written, dated, and signed at New Orleans on Dec. 31st, 1915, entirely with my own hand.

"New Orleans, Jany. 12, 1917.

"By this codicil to my will of December 31st, 1915, I, Martin Manion, do give and bequeath to my son Martin H. Manion the disposable portion of my estate that I am permitted by law to dispose of by last will and testament. Written, dated, and signed at New Orleans, Louisiana, on Jany. 12th, 1917, entirely with my own hand."

On January 30, 1917, the two instruments were presented to the district court by Martin H. Manion, one of the named executors, together with a petition in which he prayed that they be registered and executed, and that he be confirmed as executor and authorized to have an inventory taken; and, it having been so ordered, he took the required oath, received his letters testamentary, and on February 15, 1917, filed the inventory. Some two months later (on April 13th), John E. Manion, one of the sons of the decedent, instituted a suit in which he prayed that his

coheirs and the executor as such be cited, and that he have judgment (quoting the prayer of the petition) as follows:

"1. Decreeing a partition in kind of the estate owned by the decedent and referring the parties thereto to a notary public to make said partition.

"2. Striking from the will of the decedent the provision therein giving the disposable portion to Martin H. Manion, or else requiring the said Martin H. Manion to collate with the estate this disposable portion.

"3. Decreeing the provision in the original will which prohibits a partition of the estate for five years to be null, void, and of no effect, and striking it from the will, or, in the alternative, limiting it to the disposable portion of this estate.

"4. In the alternative, decreeing a partition, by licitation, of this estate, on such terms and conditions as may be proper.

"5. Recognizing petitioner and defendants as forced heirs of the decedent, and as such entitled to take possession of the property of decedent and to provoke a partition of his estate."

Defendants excepted to the suit so brought, upon the grounds that it is premature, and that the petition discloses no cause of action; and, whilst the exceptions were pending, the executor filed a provisional account, showing assets, consisting, as per inventory, of a gold watch, valued at \$50. and 331 shares of the capital stock of Manion & Co., valued at \$33,100, together with dividends thereon to the amount of \$1,158.50, making a total of \$34,308.50; and showing also liabilities consisting of law charges, expenses of last illness and funeral, and ordinary debts to the amount of \$4,454.75, thus leaving a balance of assets amounting to \$29,853.75 of which no distribution is proposed. John E. Manion and one of the ordinary creditors thereupon filed oppositions—that of Manion setting up objections (which were subsequently withdrawn) to certain items appearing on the debit side of the account, and otherwise predicated upon much the same grounds, and concluding with about the same prayer as are found in the petition previously filed by him. On October 29th there was judgment (signed on November 5th)

maintaining the exceptions to the suit first brought, and on November 2d, there was another judgment (signed on November 12th) dismissing the oppositions. John E. Manion has alone appealed from those judgments.

#### Opinion.

The appellant relies for the maintenance of his attack upon the will and the support of his opposition to the account upon the following propositions:

1. That the last will of Martin Manion is the document dated January 12, 1917, and that, being such, the provisions of the prior will are null, void, and of no effect.

2. That, even if the first will stands, the prohibition as to partition for five years is null and void as to the *légitime* of the forced heirs.

3. That the last will does not exempt the legatee from collating the bequest of the disposable portion.

4. That by the terms of the law the executor, who is a legatee of the disposable portion, can claim no commission.

In support of the exception of prematurity of action, counsel for the appellees argues, in effect, that the judgment ordering the execution of the will and confirming the executor does not close the succession or authorize the heirs to partition the property.

In support of the exception of no cause of action, he argues that the judgment in question, though obtained *ex parte*, must be taken as *prima facie* valid, and hence immune from collateral attack; that the question of the validity of that clause of the will in which the testator expresses the desire that the estate shall not be partitioned for five years is not now before the court, and can be brought before it only in a direct action of nullity; and that the other propositions upon which appellant relies involve conclusions of law which are not well founded.

[1] 1. It is no doubt true that an executor

cannot be divested of the *seizin* conferred on him by the will until the heirs who demand possession offer him a sum sufficient to pay the movable legacies, and if there be claims against the succession pending in court, and the holders require it, without giving bond for their payment. C. C. arts. 1012, 1050, 1660, 1670, 1671; Succession of Fisk, 3 La. Ann. 707; Bird v. Succession of Jones, 5 La. Ann. 645; Succession of Duffy, 50 La. Ann. 799, 24 South. 277. It is also true that, in this case, there are no movable legacies, nor are there, at the moment, any creditors demanding security, since the occasion for such demand has not yet arisen; but as the executor and his attorney appear upon the account filed by the former as preferred creditors for amounts which, in the aggregate, exceed one-half of the total indebtedness of the succession, and are opposing the demands of the opponent, it may be assumed that they would demand security of him. It may be added that it is not necessary, in order to support the action of partition, that the coheirs or the party commencing it should be in actual possession of the succession or the thing to be divided. C. C. art. 1320. But, though it is not necessary that the person bringing the action should be in possession, it is rather difficult to imagine how a court could proceed to order the partition of property, perhaps by licitation, which is in the possession of an officer or agent, holding as the representative, or for the benefit of third persons, having rights therein other than those of ownership. If, for instance, at the time of the institution of the action in partition, the property happens to be in the hands of the sheriff, under an order of seizure and sale issued in foreclosure of a mortgage imposed by the owner, who had subsequently died, the action could hardly be entertained; and the situation is not materially different where the property is in the hands of an administrator or executor charged with the duty of appro-

priating it to the payment of debts for which it may be liable. And so, as somewhat sustaining that view, the jurisprudence of this court is uniform to the effect that, where a succession has fallen to minors, for whom the law accepts with benefit of inventory, and heirs of age, and either the heirs of age or the creditors demand an administration, the administration should be ordered; and that there can be no putting in possession of the heirs, or partition by them, until it is completed. Succession of Clark, 30 La. Ann. 801; Succession of Bulliard, 111 La. 186, 35 South. 508; Succession of Landry, 117 La. 193, 41 South. 490. Inasmuch, therefore, as there are major and minor heirs and creditors of this succession who are resisting the demands of the single major heir that the heirs be put in possession and the estate partitioned, we are of opinion that those demands have properly been held to be premature.

[2] 2. Considering the exception of no cause of action in so far as it may be predicated upon the idea that this is a collateral attack upon the judgment ordering the will to be admitted to probate, and that appellant should have resorted to a direct action, we are of opinion that it is not well founded. The judgment in question, having been rendered in a proceeding to which the appellant was not made a party, is not conclusive upon him as to the validity of the provisions of the will.

"It is perfectly well settled" (said this court many years ago) "that such a decree is not conclusive upon the heirs not cited, and that, when set up as a muniment of title against their claim for property belonging to their inheritance, the validity of a will thus probated may be called in question \* \* \* collaterally." *Provost v. Provost*, 13 La. Ann. 574.

The legal situation here presented may be stated as follows: A will in due form, is presented for probate to a court vested with jurisdiction in such matters, and the proponent, having complied with all the re-

quirements of law, obtains an order (called a judgment) for its registry and execution. Upon its face the instrument is in some respects valid, and in other respects it may be invalid, or the question of its validity may be one about which lawyers and courts will disagree. The judge to whom it is presented is not in a position to determine, off-hand, questions of that character, which may be litigated for years; and, even should he do so, his judgment would certainly bind no one except the person invoking such action, and it is quite doubtful whether even he would thereby be concluded from contesting the validity of the will; this court having expressed itself on that subject as follows:

"We are not prepared to say that the mere order of the judge for the execution of a will has the effect of a judgment, binding even upon those at whose instance it was made, so far as to conclude them from subsequently contesting the validity of the will, unless, upon the probate, the question of its validity was expressly put at issue." *Sophie v. Duplessis*, 2 La. Ann. 726.

The order, made without citation or hearing of, or issue joined with, parties in interest, known as the "common," as contradistinguished from the "solemn" form of probate, is merely preliminary and tentative in its operation, and is made because of the necessity, which arises at the moment of death, to take immediate action for the preservation of the estate of the decedent, in order that his wishes, as expressed in his will, the validity of which is thereafter to be determined, may eventually be carried into effect. It is true that the will may be declared void in toto, as not having been made in the form or manner prescribed by law; or it may be found valid as to form, or manner of execution, and, whilst valid in so far as the appointment of an executor and the delivery of seizin are concerned, void as to all other dispositions; or, as we find in this case, it may be valid as to form and manner

of execution, as to the appointment of an executor, with seizin, and as to certain of its dispositions, and invalid, or inoperative as to others. And in such case there is no occasion and may be no desire and no attempt (and there is none here), to annul the order for the execution of the will, since all that is necessary is to invoke an interpretation of it contradictorily with the parties in interest, and have it, authoritatively and conclusively, determined whether it was thereby intended to sanction alike valid and invalid dispositions of the will, or, as must necessarily be the case with an *ex parte* order, was intended to operate tentatively and subject to such modification as might be determined upon after a hearing of the parties whose interests it would otherwise affect. The appellant now before the court is such a party; he has brought his suit in the court by which the order in question was made, and has caused to be cited all those whom it may affect; he asks, not that it be annulled, but that it be construed and restricted in its operation within the confines of the law; and we are of opinion that the course pursued by him is legal and proper, and that he is under no obligation to sue for the nullity of an order which he does not believe to be obnoxious to that objection.

[3] 3. Considering the argument (in support of the same exception) leveled at the averments of appellants' petition and opposition, to the effect that "the will, in the shape of a codicil, is unknown to our law," and that where as in this case it contains a "universal legacy," it (if sustained) supersedes the will, we remark (merely to keep the record straight) that the codicil here in question contains a legacy under universal title, but not a universal legacy. The learned counsel call our attention to the facts, that the Code of 1808 contained the following article:

"Art. 83. The codicil is an act less solemn than the testament, by which the testator can

dispose only on a particular title and only of movable effects."

That, as the legacy by particular title was otherwise provided for in the Code of 1825, the codicil was abolished (by being omitted therefrom); and they quote as follows from the report made to the General Assembly by the redactors of the Code of 1825, to wit:

"We propose to suppress codicils; they appear to be absolutely useless and create only confusion in the subject of last wishes. Therefore all that relates to codicils will be stricken out of the Code in the projet which will be presented to the Legislature."

Either the redactors or the Legislature must have thought better of it, however, and have concluded to abolish only the codicil as defined in the Code of 1808, since the Code of 1825 contained (as article 1563), and the present Code contains, the following:

"Art. 1570 (1563). No disposition *mortis causa* shall henceforth be made otherwise than by last will or testament. Every other form is abrogated. But the name given to the act of last will is of no importance, and dispositions may be made by testament under this title or under that of institution of heir, of legacy, codicil, donation *mortis causa*, or under any other name indicating the last will, provided that the act be clothed with the forms required for the validity of a testament, and the clauses it contains, or the manner in which it is made, clearly establish that it is a disposition of last will."

The "codicil" is therefore embedded in our system, and, having been freed from the trammels which bound it under the definition contained in the Code of 1808, is not here different from the codicil which is known elsewhere and is thus defined, to wit:

"Codicil. A codicil is an addition or qualification to a will and is a part of the will." 40 Cyc. p. 994.

In the instant case it appears that William J. Manion, named, with his brother, as coexecutor of the original will and collegatee of the disposable portion of his father's estate had died shortly before the death of his father, and it is quite evident that the sole purpose of the codicil was to

confer upon the survivor of the two sons all that the father had intended to confer on them jointly. The original will expresses that idea, in saying, "If either should die before me, I desire that the survivor shall act" (as executor) "alone." It was apparently considered necessary however, to add the codicil in order that the survivor should succeed to the whole interest in the disposable portion of the estate, since the original will contained no provision upon that subject.

[4] 4. The clause in the original will, reading, "The extra portion that I give to my sons Martin H. Manion and William J. Manion is not intended to be in compensation for services as executors," is explicit to the effect that the bequest of the disposable portion was intended as an extra portion, and hence not to be collated. *Hughes v. Hughes*, 14 La. Ann. 85 et seq.; C. C. art. 1233.

[5] 5. Holding, as we have done, that this suit is properly brought, we know of no reason why the question suggested by the clause in the will expressing the desire of the testator that the estate be not divided for five years is not before the court.

Article 1299 of the Civil Code declares that a testator cannot order that effects given or bequeathed by him to two or more persons shall never be divided, and the following articles read:

"Art. 1300 (1223). But a donor or testator can order that the effects, given or bequeathed, by him, be not divided for a certain time, or until the happening of a certain condition. But, if the time fixed exceed five years, \* \* \* the judge \* \* \* may order the partition, \* \* \* if the coheirs cannot agree," etc.

"Art. 1301 (1224). If the father \* \* \* orders by his will that no partition shall be made among his minor children or minor grandchildren inheriting from him, during the time of their minority, this prohibition must be observed, until one of the children or grandchildren comes of age, and demands the partition."

It will be observed that articles 1299 and 1300 deal with property "given or bequeathed," not, necessarily, by a person from whom the donee or legatee would inherit, but by

any one; the purpose of the articles being to prevent the tying up of property by conditions imposed in donations and bequests. The articles have therefore no appreciable bearing upon the rights of forced heirs, with respect to the *légitime* which becomes theirs, by operation of law, upon the death of the persons to whom they occupy that relation. C. C. arts. 940, 945, 1493, et seq. It is true that they inherit their *légitime*, in the sense that it devolves upon them upon the death of the person of whom they are the forced heirs, but, unlike the rest of his estate, it devolves upon them though he may bequeath it to some one else; their paramount title is therefore derived from the law, and the bequest of the former owner is merely his acquiescence in that which the law ordains. Article 1301, on the other hand, deals with "minors, inheriting" from those of whom they are the forced heirs, but confines the permission to tie up the property so inherited to the period of minority, and is careful to add that it may be untied by the minor, child, or grandchild who first attains majority; after which there is no law, save article 1300, under which they can be kept out of any part of their inheritance; and that article, as we have seen, is confined in its application to so much of the estate of their ancestor as the law accords him the right to give or bequeath and as he may give or bequeath to them. Nor can they be compelled to hold any other property in common, since the law so expressly declares. C. C. art. 1289. We therefore, conclude that the expressed desire of the testator that his estate be not divided for five years could not, in any event, be given effect save as to the disposable portion, nor as to that, since it has been bequeathed not to two or more persons, but to one person.

[6] 6. Article 1683 of the Civil Code fixes the commission of an executor who has had seizin of all the estate of the succession at 2½ per cent. on the whole amount of the

estimate of the inventory, making a deduction for what is not productive and for what is due by insolvent debtors. Article 1687 declares that:

"In no case shall the commission allowed to the testamentary executors affect the légitime reserved to the forced heirs of the testator."

In the instant case the executor, receiving the entire disposable position, can be allowed no commission which would not affect the légitime of the forced heirs; hence no commission can be allowed.

It is therefore ordered and decreed that the judgments appealed from be affirmed in so far as they, or either of them, hold the action for partition to be premature, and dismiss it, and in so far as they, or either of them, hold that the averments that the codicil supersedes the original will, and that the legatee of the disposable portion of the estate should collate the same, disclose no cause of action; and that said judgments be reversed in so far as they, or either of them, hold that the attack upon the will should have been made in a direct action for the nullity of the order admitting the same to probate; that the averments to the effect that the clause in the will looking to the postponement of the partition for five years disclose no cause of action; and that the opposition to the allowance of the commission to the executor was not well founded. It is further ordered that the case be remanded, to be proceeded with according to law and to the views herein expressed, the costs to be paid by the mass.

(79 South. 413)

No. 22789.

GENERES v. BOWIE LUMBER CO.

(April 11, 1918. On Application for Rehearing, June 29, 1918.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION §72 — SUCCESSION—ACCEPTANCE OR RENUNCIATION OF SUCCESSION—CONSTRUCTION OF STATUTE.

Article 1030 of the Civil Code, declaring that the faculty of accepting or renouncing a succe-

sion becomes barred by the lapse of time required for the longest prescription of the rights to immovables, means that one right or the other, either the right to accept or the right to renounce, whichever right or faculty the heir should have exercised before the lapse of 30 years, is prescribed at the end of the 30 years.

2. DESCENT AND DISTRIBUTION §72 — SUCCESSION—ACCEPTANCE OR RENUNCIATION OF SUCCESSION—CONSTRUCTION OF STATUTE.

Article 1030 of the Civil Code does not mean that both faculties, that of accepting and that of renouncing a succession, become prescribed simultaneously, as to one and the same heir; for that is impossible. It is only the faculty which the heir has a right to exercise and an interest in exercising, before the lapse of 30 years, that becomes prescribed by the lapse of 30 years.

3. DESCENT AND DISTRIBUTION §72, 119(2)—SUCCESSION—ACCEPTANCE OF RENUNCIATION OF SUCCESSION—PRESCRIPTION.

If it be the faculty of accepting the succession that the heir has to exercise, in order to avail himself of his rights as an heir, it must be exercised within 30 years, or the faculty will become prescribed. If it be the faculty of renouncing the succession that the heir has to exercise, to avoid the obligations of the deceased, that faculty must be exercised within the 30 years, or it will become prescribed.

4. DESCENT AND DISTRIBUTION §72 — SUCCESSION — HEIRSHIP — PRESCRIPTION — STATUTE.

By the prescription of 30 years, established by article 1030 of the Civil Code, the status of the heir or relation to the deceased person is irrevocably fixed, as either that of an heir or that of a stranger, according to what the status was at the moment before and when the 30 years expired.

5. DESCENT AND DISTRIBUTION §72 — SUCCESSION — ACCEPTANCE OF SUCCESSION — RIGHT OF RENUNCIATION.

An heir who has not formally accepted the succession, nor committed an act that has made him liable as an heir, may exercise either faculty—that of accepting or that of renouncing the succession—at any time within 30 years. Even an heir who has renounced may yet accept the succession, at any time within 30 years, provided it has not been accepted by other heirs, and provided rights acquired by third persons either by prescription or by lawful dealings with the succession representative shall not be prejudiced.

6. DESCENT AND DISTRIBUTION §72 — SUCCESSION — RENUNCIATION OF SUCCESSION — PRESCRIPTION.

With regard to forced heir, in whom the law vests seisin of the estate or the right of possession without his having to accept the succession, it is only one who has renounced who stands to lose by prescription the right to accept; and it is only one who has not renounced who can lose by prescription his right to renounce.



**7. DESCENT AND DISTRIBUTION §72 — SUCCESSION — FORCED HEIRSHIP — ACCEPTANCE — PRESCRIPTION.**

A forced heir, particularly one who was a minor child when the succession was opened, who has never renounced the succession, does not lose by prescription his right of inheritance, by failing to accept the succession within 30 years, because, if he has not renounced the succession, he is presumed to have accepted it, and the only faculty that he has to lose by prescription is the faculty of renouncing.

**8. LIMITATION OF ACTIONS §12(1) — PRESCRIPTION — STATUTE OF REPOSE — PURPOSE.**

Statutes of repose, by which titles are confirmed, are enacted for the benefit of those only who have a primordial or voidable title, not for the benefit of trespassers or possessors without even a voidable title.

**9. LIMITATION OF ACTIONS §12(1) — PRESCRIPTION — TRESPASSER — STATUTE.**

The prescription of 30 years referred to in article 3548 of the Civil Code does not defeat a petitory action instituted by the owner against a trespasser or possessor without as much as a voidable title and without 30 years' possession.

*(Additional Syllabus by Editorial Staff.)*

**10. PLEADING §112 — PLEA OF PRESCRIPTION — EFFECT AS ANSWER.**

Although it would have been expeditious to have referred the plea of prescription to the merits of the case, or to have tried it with the merits, it was not an error to refuse to consider the plea as an answer to the suit.

Monroe, C. J., dissenting.

Appeal from Twentieth District Court, Parish of Lafourche; William E. Howell, Judge.

Petitory action, coupled with an action in damages for trespass, by George A. Generes against the Bowie Lumber Company. Judgment maintaining defendant's plea of prescription in part and overruling it in part, and plaintiff appeals. Judgment annulled, and case remanded for trial on the merits.

W. B. Le Bourgeois, of New Orleans, for appellant. Caillouet & Caillouet, of Thibodaux, for appellee.

O'NIELL, J. This is a petitory action to recover two tracts of swamp land in the defendant's possession. The plaintiff claims

also \$47,100.56, alleged to be the value of forest timber taken from the lands by the defendant. The lands are described as the N.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of section 4, and all of that portion except the N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of section 6 that lies on the north side of Bayou Chevrill, in T. 14 S., R. 18 E., in the Southeastern district of Louisiana, west of the Mississippi river.

The plaintiff claims title by inheritance from his parents, Louis F. Generes and Mrs. Josephine Abat Generes, his coheirs (collateral relations) having renounced and succession of their deceased parents, and he having been recognized as the sole heir of his father by a judgment of the civil district court for the parish of Orleans.

He alleged that the lands were acquired by Louis F. Generes by purchase from the state of Louisiana, the land in section 4 by patent No. 2187, and that in section 6 by patent No. 2188, both dated the 13th of December, 1875.

The plaintiff alleged that the defendant had no title whatever to the land in section 4; that the defendant claimed the land in section 6 by virtue of a deed from the Acme Land & Timber Company, dated the 12th of November, 1908; but that the Acme Land & Timber Company had had no title whatever, and had made the sale without warranty and for an inadequate price. The plaintiff alleged that the sale was therefore absolutely null, and that the defendant was a mere trespasser on both tracts of land.

After certain dilatory exceptions, which we need not consider, had been filed and disposed of, the defendant filed a plea of prescription of 30 years, based upon articles 1030 and 3548 of the Civil Code. The plaintiff obtained a rule on the defendant to show cause why the plea of prescription should not be considered an answer to the suit.

The rule was tried and dismissed, and the plea of prescription was tried and disposed of as such.

The evidence adduced on the trial of the plea of prescription disclosed that the plaintiff's father, Louis F. Generes, died in Havre, France, on the 28th of October, 1875; that his succession was opened and his will probated in New Orleans, his last domicile, in that year. The inventory of the estate, made in November, 1875, did not mention the lands involved in this suit, probably because the patents had not then been issued. It appears that the widow, Mrs. Josephine Abat Generes, mother of the plaintiff, was present at the making of the inventory, in her capacity of widow in community and tutrix of her minor children, and signed the *procès verbal* of the notary public. The plaintiff was then a minor, having been born on the 22d of September, 1856. Two of the daughters of Louis F. Generes renounced his succession on the 30th of November, 1875. All other heirs, except the plaintiff, renounced the succession in 1916. The final account of the administrator was filed on the 2d of July, 1885.

On the petition of the plaintiff, filed in March, 1916, an *ex parte* judgment was rendered by the civil district court for the parish of Orleans on the 4th of May, 1916, recognizing the plaintiff to be the sole heir of Louis F. Generes.

The plaintiff's mother died intestate on the 6th of October, 1905.

This suit was filed in August, 1916, four months after the plaintiff was informed that the defendant had cut the timber from the land. No evidence was offered to show the nature or duration of the defendant's possession of the property. The district judge assumed, from the character of the suit, that the defendant had been in possession of the land longer than a year. He sustained the plea of prescription against the plaintiff's right to recover property of the estate of his father, and overruled the plea as to the plaintiff's right of action as the heir of his mother, the widow in community of Louis F. Generes.

The plaintiff prosecutes this appeal. The defendant, answering the appeal, contends that the land in dispute belonged to the separate estate of the plaintiff's father, and prays that the judgment appealed from be amended so as to maintain that the plea of prescription bars the plaintiff's right of action for any part of the land sued for.

#### Opinion.

[10] Although it would have been expeditious to have referred the plea of prescription to the merits of the case, or to have tried it with the merits, it was not an error to refuse to consider the plea as an answer to the suit.

[1, 2] The essential fact upon which the district court maintained the plea of prescription, under articles 1030 and 3548 of the Civil Code, is that 30 years had elapsed from the date the plaintiff became of age when he formally accepted the succession of his father and asserted title to the property in contest.

Article 1030 of the Code declares:

"The faculty of accepting or renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables."

Article 3548 provides:

"All actions for immovable property, or for an entire estate, as a succession, are prescribed by thirty years."

The judgment rendered in this case is based mainly upon the decision rendered in the *Succession of Waters*, 12 La. Ann. 97, where our predecessors interpreted the expression in article 1030 of the Code "the faculty of accepting or renouncing" to mean, not either the right to accept or the right to renounce, nor the privilege or choice of either accepting or renouncing, but the right of accepting *and* the right of renouncing.

It was virtually conceded in the two opinions rendered in the case cited that the interpretation adopted by the court destroyed the effect of that part of the article (1023 of

the Code of 1825) providing for the prescription of the right or faculty of renouncing. The Chief Justice, speaking for the court, said it was not then found necessary to put a construction upon that part of the article, and that it would be in time to consider the difficulties presented by it whenever a case might arise in which an explanation, if possible, would be required. An explanation of the provision for the prescription of the right or faculty of renouncing was then utterly impossible, because in its interpretation the court had suppressed that part of the article completely.

Mr. Justice Spofford, in his concurring opinion in the case cited, recognized, or manifested, that the court was giving effect to one half and suppressing the other half of the law to be interpreted. He said, apologetically, that the rule that some effect should be given to all of the words of the law was qualified by the condition that it be possible, and that, if the lawgivers had nodded, or added idle words to their statutes, it was no more than the great masters of wisdom in all departments of letters had done before them. He added that he thought the Legislature of Louisiana had intended, by the article in question, merely to fix a term of prescription against the right of acceptance, and to intimate the consequence of its lapse without an acceptance. He said that that consequence, he thought, was that the successible became a stranger to the succession.

If the framers of article 1030 of the Code intended its meaning and effect to be that at the end of 30 years of silence the heir should become a stranger to the succession, the provision for the prescription against the right to renounce might as well have been omitted. There is unmistakable evidence, however, in the Code itself, that the lawgivers were not nodding, or adding idle words to article 1030 of the Code, when they

declared that the faculty of renouncing a succession should be barred by the prescription of 30 years.

Article 1030 is a literal translation of article 789 of the Code Napoléon, viz.:

*"La faculté d'accepter ou de répudier une succession se prescrit par le laps de temps requis pour la prescription la plus longue des droits immobiliers."*

The proof we refer to, that the provision for the prescription of the right of an heir to renounce a succession was not inserted inadvertently in article 789 of the French Code, nor copied carelessly by the compilers of our own Code, is that, when they copied article 790 of the French Code, in the adoption of article 1024 of the Louisiana Code (article 1031 of the Revision of 1870) they added this paragraph, viz.:

*"In like manner, so long as the prescription of renunciation is not determined, the heir may still renounce, provided he has done no act to make himself liable as heir."*

The framers of the Code therefore expressed as plainly as language could express their understanding and intention that article 1030 provided for the prescription of the right or faculty of renouncing, as well as of accepting, a succession.

It is as plainly demonstrated by other provisions of the Code on the subject of acceptance and renunciation of successions that the Legislature did not intend that the words "or renouncing," in article 1030, should be disregarded, as they were in the Succession of Waters. If those words mean anything, they mean that, under some circumstances, it is the right or faculty of renouncing a succession that becomes prescribed by 30 years of silence, although, under other circumstances, depending upon the status of the heir, it is the right or faculty of accepting that becomes prescribed by 30 years of silence. If it were true that any heir, whatever his status might be, should become a stranger to the succession at the

end of 30 years of acquiescence on his part, there would be no meaning whatever in saying that his right to renounce is then prescribed; for, when an heir has become a stranger to the succession, he has the advantage and is in the position of one who has renounced; and it would be absurd to say that his right to renounce is then prescribed.

We find many provisions that were inserted in the Code of 1825 and retained in the Revision of 1870 that were not in the Code or Digest of 1808, nor in the Code Napoléon, that would have no meaning whatever if it were not true that, under some circumstances, it is the faculty or right of renouncing that becomes prescribed by 30 years of silence, although, under other circumstances, it is the faculty or right of accepting that becomes prescribed by 30 years of silence. For example, article 1014 (1007 of the Code of 1825) declares that he who is called to the succession, being seized thereof in right, is considered the heir as long as he does not manifest the will to divest himself of that right by renouncing the succession. Article 1015 (1008) declares that the renunciation of a succession is never presumed, but must be made expressly by notarial act. Article 1018 (1011) declares that renunciation is the same as an alienation of the succession, and that therefore an heir cannot renounce unless he be capable of alienating. Hence the next following two articles declare that a married woman, as heir, cannot renounce the succession without being authorized by her husband, or, on his refusal, by the judge, and that an agent or attorney in fact cannot renounce for an heir, without being specially authorized to that effect.

All of that new matter in the Code of 1825 retained in the Revision of 1870 is a recognition of the necessity for a forced heir to renounce a succession in order to relieve himself of its obligations. The right to renounce a succession was therefore regarded

with as much importance as the right to accept, in the adoption of the Code of 1825. The prescription against the right of renouncing would be a matter of no importance whatever, and it might as well have been omitted from article 1030 of the Code, if it were true that any heir, of any status and under any and all circumstances, should become a stranger to the succession by his silence and inaction for 30 years.

We think, too, that the original matter in article 1031 of the Code, translated literally from article 790 of the French Code, made it quite plain that the compilers of both Codes understood and intended that the right or faculty of renouncing a succession should be prescribed by 30 years' silence on the part of an heir, and that the words, "*ou de répudier*," "*or [of] renouncing*," were not, as our predecessors on this bench thought, mere idle words. The first paragraph of article 1031, translated from the French text, provides:

"So long as the prescription of the right of accepting is not acquired against the heirs who have renounced, they have the faculty still to accept the succession, if it has not been accepted by other heirs, without prejudice, however, to rights which may have been acquired by third persons \* \* \* either by prescription, or by lawful acts done with the administrator or curator of the vacant estate."

Mr. Justice Spofford, in the opinion he delivered in the Succession of Waters, acknowledged that the provision of article 790 of the French Code quoted above was as plain a recognition of the existence in that Code of a special prescription against the right of acceptance as was manifested by the framers of our own Code when they added to the old Code, in adopting article 1014 of the Code of 1825 (retained in article 1021 of the revision of 1870) this paragraph, viz.:

"If, on the contrary, the heir has only refused to accept and has not renounced, he can claim the surplus, on accepting the succession, provided his right of acceptance be not prescribed against."

The ruling in the Succession of Waters was largely based upon the additional paragraph (last quoted) in article 1014 of the Code of 1825 (R. C. C. art. 1021). It was conceded, though, that as strong an argument in support of the interpretation given to article 1030 by the court might have been based upon article 790 of the French Code; and the opinion of Marcodé contrary to that of the court was therefore criticized.

Our own interpretation of article 1030 of the Code is that what prescribes at the end of 30 years is, not both the right of an heir to accept and at the same time his right to renounce a succession, for that is impossible, but the right to accept or the right to renounce, as the case may be, depending upon whether the heir be one who was required to accept or one who was required to renounce within the 30 years. That construction accords with the cardinal rule of giving effect to every word in the law; it is in accord with the exact language of the article, and is consonant with every other provision of the Code on that subject.

[3-5] The plain language is that the faculty of accepting or of renouncing—not and of renouncing—becomes barred by prescription. If it be the faculty of accepting that the heir has to exercise, in order to avail himself of his rights as an heir, it must be exercised within 30 years, or the faculty will become prescribed. If it be the faculty of renouncing that the heir has to exercise to avoid the obligations of the succession, it must be exercised within the 30 years, or that faculty will become prescribed; for at any time within the 30 years an heir who has not formally accepted the succession may exercise either faculty—that of accepting or that of renouncing. In fact, according to article 1031, even the heir who has renounced may yet accept the succession at any time within the 30 years, if it has not been accepted by other heirs, and provided it shall

not prejudice the rights acquired by other persons, either by prescription or by lawful dealings with the succession representative. And, in like manner, one whose quality of heir is acquired by the mere operation of law and without having to take proceedings or even to express an intention to accept may yet renounce the succession at any time within the 30 years, provided he has not committed any act that would make him liable as an heir. At the expiration of the 30 years the status of the person or relation is irrevocably fixed by the prescription established by article 1030 of the Code, either as an heir or not an heir, depending upon what his status was before the 30 years ended. To illustrate: If he was a forced heir, or if he was a legal heir, and there was no forced heir nor universal legatee, he is presumed, if he has not renounced the succession, irrevocably to have accepted it at the end of 30 years; for his right or faculty of renouncing is then prescribed. On the other hand, if he was an irregular heir, he is presumed, if he has not formally accepted or been put into possession of the estate, irrevocably to have renounced it at the end of 30 years; for his right or faculty of accepting is then prescribed.

It must be borne in mind that the legal heir succeeds to the inheritance at the instant of the death of the person from whom he inherits. R. C. C. 940. The acquisition by the legal heir takes place by operation of law, without his having to take steps to gain possession of the estate, or express his willingness to accept the succession. Children, insane persons, and those who are ignorant of the death of the person from whom they inherit are vested with seizin, as a matter of right, though not seized in fact. R. C. C. 941. The right which the deceased had of possession of his estate continues in the legal heir, as if there had been no inter-

ruption, because the legal heir is considered seized of the succession from the instant of the death of the person from whom he inherits. R. C. C. 942. By *seizin* is meant, not possession in fact, but the right of possession, of the property of the succession. R. C. C. 941.

[6, 7] How can it be said then, that a forced heir, who is invested with the right of possession of the property of the succession by operation of law and without having to accept the succession, loses "the faculty of accepting" by the prescription of 30 years?

The interpretation of Marcodé, which the court rejected in the *Succession of Waters*, was that it was the hereditary right itself, that is, the heir's right or faculty of choosing whether to accept or to renounce the succession, that was prescribed by article 789 of the French Code.

Fuzier-Herman, vol. 2, p. 90, expresses the same opinion. He says that it follows clearly from article 789 that the heir has 30 years in which to choose, and that the presumptive heirs who might be called in his default have no way of forcing him to act, unless it be by putting themselves in possession of the property. He says that the doubt as to what is the effect of the prescription has given rise to one of the most important discussions of the scientists, and that those discussions have suggested as many as eight different theories. He declares that by the eighth theory, or system, the jurisprudence has gradually departed from the other seven diverse rulings, and has become fixed upon one that is closer to the text of the article; that is, that what is prescribed after 30 years is the hereditary right of choice between acceptance and renunciation.

In one sense it is correct to say that what is prescribed is the right of the heir to elect whether to accept or renounce the succession.

because during the 30 years the legal heir may either accept or renounce the succession, and even though he has renounced, he may yet accept it, provided it has not been accepted by other heirs, and provided third parties have not acquired rights on the estate by prescription or by lawful dealings with the succession representative. But the idea is expressed more clearly by saying, in the precise language of article 1030, that it is either the faculty of accepting or the faculty of renouncing that is prescribed after 30 years. If the legal heir has renounced the succession, it is the right yet to accept that is prescribed after 30 years; if he has not renounced, it is the right to renounce that is prescribed after 30 years.

The paragraph that was added to article 790 of the French Code, in adopting it as article 1024 of the Code of 1825 (article 1031 of the Revision of 1870), makes it very plain that, with regard to forced heirs, it is only one who has renounced who can lose by prescription the right to accept, and it is only one who has not renounced who can lose by prescription the right to renounce; for it is to be noted that, according to article 1031, the heir who has formally accepted the succession, or has committed any act that has rendered him liable as an heir, has thereby fixed his status irrevocably. He has then no right to renounce, and, since he has already accepted the succession, he is expressly exempted from the operation of the prescription mentioned in article 1030, as to either the faculty of accepting or the faculty of renouncing. But the legal heir who has not renounced the succession, and in whom the law has vested *seizin* of the estate without requiring an acceptance on his part, has no other right or faculty to lose by prescription than the right or faculty of renouncing; and the heir who has renounced has no other right or faculty to lose by prescription than the right or faculty of accepting. Hence, as to a forced

heir, depending upon whether he has or has not renounced, "the faculty of accepting or [of] renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables."

It is said by the learned judge of the district court that the decision rendered in the Succession of Waters has been approved twice, referring to the case of *Terry v. Heisen*, 115 La. 1083, 40 South. 461, and that of *Schultze v. Frost-Johnson Lumber Co.*, 131 La. 966, 60 South. 629. The citation of the former decision, however, in the later cases cited, was not made with approval of the interpretation of article 1030 of the Civil Code, nor with any reference to the question now under consideration. In *Terry v. Heisen*, the court was construing article 233 of the Constitution of 1898, establishing the prescription of three years against a suit to annul a tax sale; and the reference to the decision rendered in the Succession of Waters was made merely to show how far the court had gone in recognizing the sovereign power to fix a time within which an action should be exercised or become forever prescribed. In the case of *Schultze v. Frost-Johnson Lumber Company* the court concluded, before mentioning the Succession of Waters, that the heirs had acquiesced in a sale of the property made by their father. The decision in the Succession of Waters was then stated, only incidentally and without comment. Hence it cannot be said that the construction given to article 1030 of Civil Code in the Succession of Waters has ever been deliberately affirmed. To adhere to that decision now would be to adopt an interpretation that is contrary to the letter of article 1030, and to every other provision of the Civil Code on the same subject. Our deliberate conclusion is that the doctrine of the decision in the Succession of Waters should be overruled, not perpetuated.

The plaintiff in this case was not only a

forced heir, being a son, of Louis F. Generes, but was a minor child when his father's succession was opened. It was never necessary for him to accept the succession. The law accepted it for him, with benefit of inventory. In the precise language of article 941 of the Code, he was considered as being seized of the succession; that is, he was vested with the right of possession, though not with possession in fact. He was therefore one of those heirs who had no other right or faculty to be exercised within 30 years or to be lost by the prescription established by article 1030 of the Code, except the right or faculty of renouncing the succession.

Referring now to the prescription mentioned in article 3548 of the Code, it is conceded that the defendant has not had possession of the land long enough to have acquired title by prescription.

The argument of the learned counsel for the defendant is that, because article 3548 of the Code appears in the section treating "Of the Prescription Which Operates a Release from Debt," the article must be regarded merely as a statute of repose, or as establishing a prescription *liberandi causa*.

Our opinion is that the article is merely an affirmation of article 3499, by which the ownership of immovable property is acquired by 30 years' possession. The doubt about the meaning of article 3548 arises from its position in the Code, being in the section that treats "Of the Prescription Which Operates a Release from Debt." The prescription which operates a release from debt has no application or relation whatever to the acquisition or loss of title to immovable property.

[8] Statutes of repose, by which titles are confirmed or quieted, such as, for example, the prescription of three years against suits to annul tax titles, are enacted only for the benefit of persons holding a primordial title, not for the benefit of trespassers, or persons

holding possession without as much as a voidable title.

The French jurists and commentators now agree that the corresponding (or nearly corresponding) article of the Code Napoléon (article 2262) does not apply to a petitory action, but applies only to an action of nullity. See decision by the Court of Cassation, in *Cohn v. Morvan*, Journal de Palais, 1907, p. 273. See, also, Laurent, vol. 32, No. 384; Huc, vol. 4, Nos. 245, 434; Aubry & Rau (4th Ed.) vol. 2, pp. 322, 395, and volume 8, p. 429; Baudry-Lacantinerie & Tissier (3d Ed.) Prescription, Nos. 593 and 594.

[9] We cannot adopt the theory of the learned counsel for the defendant that, although the defendant has not acquired title by the prescription of 30 years, and even though the defendant may not have a primordial title, nevertheless the plaintiff has lost his title by prescription. To hold that the prescription of 30 years can defeat a petitory action by the owner to recover his property from a trespasser, or possessor without as much as a voidable title, would completely nullify article 3499 of the Code and the settled jurisprudence holding that actual possession for 30 years is necessary to acquire the ownership of immovable property by the prescription of 30 years.

The judgment appealed from is annulled, and it is ordered that this case be remanded to the district court for trial on its merits. The defendant is to pay the costs of appeal and the costs of trial of the plea of prescription; all other costs to depend upon the final judgment.

MONROE, C. J., dissents.

On Application for Rehearing.

PER CURIAM. Rehearing denied.

See dissenting opinion of LECHE, J., 79 South. 418.

(79 South. 421)

No. 21173.

Succession of RUFIN.

(June 29, 1918.)

(Syllabus by the Court.)

1. JUDGMENT  $\Leftrightarrow$  67(1), 90 — JUDGMENT BY CONFESSION—REVERSAL.

A judgment by confession is not set aside for errors of fact which are in no wise attributable to the fault of the party in whose favor such judgment was rendered, and, a fortiori, is that true of a judgment obtained at one's own instance and in one's own favor, as well as in favor of the party to whose prejudice it is sought to be annulled.

2. DESCENT AND DISTRIBUTION  $\Leftrightarrow$  82—SUCCESSION—JUDGMENT—WAIVER OF ILLEGITIMACY.

There is no law in this state, enacted in the interest of public policy or good morals or regulating the devolution of property, which precludes a person who is sui juris from waiving the obstacle of illegitimacy and concurring with his unfortunate brother in the obtention of a judgment putting them in possession, share and share alike, of the estate of their common parents.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Petition by Hypolite Rufin to annul a judgment, recognizing Suzanne St. Martin and others as widow in community and as heirs, respectively, and admitting them to possession of the estate of Jean Rufin, deceased, with exception of nonjoinder by Jean Rufin and with supplemental petition by plaintiff, Hypolite Rufin, making Denis Rufin and others parties to the suit, and in which Denis Rufin and others filed exceptions. Judgment against plaintiff, and he appeals. Affirmed.

Charles T. Starkey, of New Orleans, for appellant. E. J. Meral, Roger Meunier, and Emile Pomes, all of New Orleans, for appellees Rufin.

Statement of the Case.

MONROE, C. J. On March 25, 1912, there was filed in the civil district court a petition signed by Suzanne St. Martin, as widow in community, and five other persons, in-



cluding Hypolite and Jean Rufin as children and heirs of Jean Rufin, in which it was alleged that he had died in New Orleans in 1893, that he had been married but once, and that to Suzanne St. Martin the petitioner first named; that of said marriage were born "the following named children," naming the five other petitioners, including Hypolite and Jean and one other who was born on December 25, 1874, and died some months later; and that he left an estate, consisting of his interest in the community which had existed between him and his wife; and praying that the petitioners so named be recognized as widow in community and heirs, respectively, and as such sent into possession of the estate; and judgment was rendered as prayed for. On April 25th following the same parties united in making a sale, for \$15,000, of certain real estate, forming part of the succession property the widow renouncing her usufruct thereof. On April 18, 1913, the widow died, and on May 7th an inventory of the property of her succession was taken, in the presence of all the heirs, two of whom, her son and executor, Denis Rufin, and her daughter, Mrs. Bordes, were bequeathed extra portions. Those dispositions apparently gave some dissatisfaction, and on December 16th the heirs united in the execution of an instrument, which contains, among others, the following recitals and stipulations to wit:

"And said appearers further declare that differences have arisen between them relative to said succession, and the settlement thereof, and which they have settled and compromised, and they do hereby settle and compromise the same, on the following basis."

It was then agreed that Denis Rufin should accept \$5,000 in cash, in lieu of certain real estate specially bequeathed to him; that the special legacy to Mrs. Bordes should remain undisturbed; that the executor should pay Hypolite Rufin \$1,500; and it was declared:

"That the above agreement and stipulations are in the nature of a compromise, and are in-

tended to, and do, constitute a full, complete, and final statement of all the claims and counterclaims which they have, or may have, against each other, connected with, or growing out of, the succession of their late mother, and that all property, movable or immovable, received by them, or by each of them, should not be brought back into her succession, but should be kept by each of them, and no account whatever should now, or at any time, be taken of them."

The parties also approved the account of the executor in every respect, which included a proposed distribution among the heirs, who thereafter, on January 9, 1914, united in a petition to the court, in which, after reciting the facts, of the death of their mother, the probate of her will, the compromise agreement, etc., they allege that they accept her succession, purely and simply, and pray the court to recognize them as the sole and only children and forced heirs of their mother, entitled to her entire succession save that disposed of by special legacies, and put them in possession of the same, and there was judgment as prayed for. On April 13, 1914, Hypolite Rufin filed the petition which initiated the litigation, the judgment in which has been brought here, on his appeal for review. He therein alleges that he is one of "the four legitimate children" of his parents, the others of that class being his brother Denis, his sister Mrs. Leonie Bordes and his sister Mrs. Leontine Pardou; that "the Jean Rufin, referred to in the judgment of March 25, 1912," is an illegitimate, unacknowledged child of Suzanne St. Martin and an unknown father; that he was born on April 10, 1872, in the Commune de Meillon in France, almost 3 years prior to the marriage of petitioner's parents, which took place at the Cathedral in New Orleans on March 19, 1875; that, if he is a son of petitioner's father, which is denied, he was born out of wedlock, and was never legally acknowledged; that about April 25, 1912, petitioner's mother sold, for \$20,000, a certain square of ground which she had acquired with funds

belonging to the estate of Jean Rufin and that on April 26, 1912, she, as widow, and the legal heirs of Jean Rufin, "together with said illegitimate child Jean Rufin," sold, for \$15,000, a square which had formed part of the community estate; that the proceeds of the two squares were amicably partitioned, and said illegitimate child, illegally and without any right, received \$4,000, receiving, to petitioner's prejudice \$1,000 cash; that petitioner did not know that said illegitimate child was an unacknowledged illegitimate child until December 23, 1913, and did not know that petitioner's father was not the father of said illegitimate child until December 23, 1913, and that said child had never been acknowledged or legitimated by Suzanne St. Martin or Jean Rufin, petitioner's mother and father; that for the first 11 or 12 years of his life said illegitimate child, Jean Rufin, was known only by the name of Jean St. Martin; that he made his first communion under the name of Jean St. Martin; that he knew, for the last 30 years, of his bastardy, or illegitimacy, notwithstanding which he fraudulently claimed an undivided one-fifth interest of the estate of petitioner's father and mother; that the judgment herein rendered on March 25, 1912, in so far as it recognizes said illegitimate child, Jean Rufin, as a legitimate child, and as such entitled to an undivided one-fifth of the estate of petitioner's father and mother is an absolute nullity, rendered in contravention of a prohibitory law, and should be set aside, etc.

He prays that Jean Rufin be cited, and for judgment against him for \$1,000, with interest, and decreeing the nullity, in so far as it recognizes said Jean Rufin, of the judgment of March 25, 1912. Jean Rufin excepted to the petition on the ground that it failed to pray for the citation of necessary parties, and by supplemental petition Denis Rufin, Mrs. Bordes, and Mrs. Pardou were brought

into the case. All of the defendants then pleaded the exceptions, no cause of action, estoppel and res judicata, and there was a trial, upon which the evidence adduced relates mainly, if not exclusively, to the question of estoppel.

Plaintiff, defendant in exception relies entirely upon his own testimony to satisfy the court that, in recognizing Jean Rufin as his brother and coheir as appears in the foregoing statement, he did so in ignorance of facts, or of the fact that he was an "unacknowledged illegitimate child," but he does not pretend to say that his ignorance was attributable to any deception or concealment practiced by defendants. He alleges that Jean Rufin, knowing for 30 years that he was of illegitimate birth, fraudulently participated in the friendly partition among the heirs, but he proves no fraud, and his twin brother, Denis, who like himself is 36 years old, testifies that he and all the family, plaintiff as well as himself, have always known that Jean was born in France; and that their parents were married after they came to this country. As they and the other children were born of the marriage, naturally neither could testify of his own knowledge concerning anything that occurred at that time or for some years afterwards, and no other members of the family, save Jean and the wife of the plaintiff were called as witnesses. Most of the information that we get is therefore derived from family tradition, according to which, and to the testimony of Jean, the father of the family left France, probably, in 1870 or 1871, to escape conscription, and the mother followed a year later. Jean says that he was born in 1871; that his mother was married 3 or 4 years afterward in New Orleans; that he had been left in France, where he lived with his grandparents, until he became something of a boy, possibly 10, or maybe 13, years old; and that he learned about the marriage, etc., after he

came here; that his father, Jean Rufin, deceased, sent money over there for his maintenance, and that he had learned to read everything before he came here. Plaintiff professes not to have known anything about those matters that he has found it decent and respectful to the name of his mother to rake up until December 23, 1913, when, after having his wife write to France upon the subject, he received what is said to be a certificate concerning the registry of the birth of Jean, but it was objected to on the ground that it was not authenticated, and the objection was sustained, though the document was allowed to go in to prove *rem ipsam* on the statement by plaintiff's counsel that another one properly authenticated would be produced, but no other was produced, and the unauthenticated certificate proves nothing save that in November, 1913, before the "agreement and compromise" was entered into plaintiff began making an effort to obtain documentary evidence of something that had been familiar knowledge to him for many years.

Being asked to give his reason for having his wife write for the certificate, he refused to give it. He testified that he always knew that Jean was born in France; that he had always heard that his mother was married here in 1875. At another time, he says that he obtained that information from his wife; that she told him about the time of the compromise, but that she had known it about 5 years; had been told by Jean's wife. Our conclusion is that the truth in regard to the time when plaintiff became informed as to Jean's status, without having authenticated documentary evidence upon the subject, is to be found in the testimony of his twin brother, Denis, who, testifying against his own pecuniary interest, says that they always possessed that information; that it was well understood in the family.

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### Opinion.

Pretermittin any consideration of the exceptions of no cause of action and *res judicata*, we are of opinion that the plea of estoppel was properly sustained.

[1] Counsel for plaintiff argues that he has brought his case within C. C. art. 2291, by proving that his client, judicially and otherwise, acknowledged Jean Rufin to be his legitimate brother and coheir, and co-operated with him as such in consequence of an error of fact; that is to say, because he believed him to be something which he was not, his acknowledged, illegitimate, brother, or his legitimate brother, or whatever it may be. But, a judicial confession, and still less a judgment obtained at one's own instance but which also confers rights upon others, is not set aside because of errors of fact which are, in no wise, attributable to the fault of the party to whose prejudice they are sought to be annulled, nor can an error of fact be invoked for such a purpose by one who, being abundantly put on inquiry, obtains or permits a judgment to be rendered without making proper effort to inform himself of the facts.

"The party applying for relief must not have been guilty of laches or negligence. He must exhibit a case where an execution of the judgment would be against good conscience, and it must show matter of which the defeated party could not avail himself in the trial of the former suit, or that he was prevented from availing himself by accident or fraud, or could not have known of before by reasonable diligence." *Perry v. Rue*, 31 La. Ann. 288; *Swain v. Sampson*, 6 La. Ann. 800; *Norris v. Fristoe*, 3 La. Ann. 648; *Succession of Corrigan*, 42 La. Ann. 70, 7 South. 74; *Warren v. Copp*, 48 La. Ann. 810, 19 South. 746. It is a good defense to a suit that the contract on which it is based was consummated by deception or fraud. But such averment would not be a valid basis for annulling a judgment obtained without fraud or other ill practices of the judgment creditor." *Merchants' Ins. Co. v. Pointer*, 22 La. Ann. 621.

[2] Counsel for plaintiff makes the statement in his brief that Jean Rufin knew of his illegitimacy from the time he was 11 or 12 years of age, but that statement must be

based on Jean Rufin's testimony, since the record contains no other information on that subject, and what he testifies to is that he never knew that his parents were married in New Orleans, after leaving him in France until after he came here, having obtained that information, no doubt, as a member of the family, none of which tends to prove that he practiced any fraud or deception on plaintiff, who, having lived in the family for about 30 years prior to the institution of this suit, had opportunities of acquiring all the information that Jean Rufin acquired about himself that were quite as good as those of Rufin, and probably better, since there may have been those who were willing to speak to plaintiff about Jean's status who would not have mentioned so delicate a matter to him.

Counsel then invoke the various articles of the Civil Code concerning prohibitory laws, and the law regulating the devolution of property, but we fail to find that any of them preclude a person who is sui juris from waiving the obstacle of illegitimacy and concurring with his unfortunate brother in the obtaining of a judgment putting them in possession, share and share alike, of the estate of their common parents. The brother of the plaintiff, who has not joined him in this suit and who has given testimony to the effect that plaintiff has always known that of which he now pretends to have been ignorant, and the two sisters, who have not even appeared as witnesses in the case, were evidently of the opinion that he whom their parents had publicly recognized as their child, and whom, during all their lives, they had been taught to treat as a brother, should receive from them the consideration of a brother, and, above all, that they should not proclaim an early fault of the dead which, but for some such proceeding as this, would soon be forever buried in oblivion. For the reasons thus assigned, the judgment appealed from is affirmed, at the cost of the appellant.

(79 South. 424)

No. 21073.

CHALMERS v. FROST-JOHNSON LUMBER CO. et al.

(Jan. 28, 1918. On Rehearing, June 29, 1918.)

(Syllabus by the Court.)

1. PUBLIC LANDS ~~§~~152 — RECEIVER'S CERTIFICATE—RECORD—NOTICE.

The rule that an unrecorded sale of real estate does not bind third parties applies as well to a receiver's certificate, not recorded in the land office, and on which no patent was issued, as to a sale made by an individual, not recorded in the parish in which the land conveyed is situated.

On Rehearing.

2. APPEAL AND ERROR ~~§~~1178(4)—REMAND FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A civil case will not be remanded for the introduction of newly discovered evidence when the failure to make the discovery during the trial in the district court appears to have been attributable to a lack of diligence, and, particularly, where the claim asserted is stale and without equity.

Appeal from Twenty-Fifth Judicial District Court, Parish of Livingston; Roberts S. Ellis, Judge.

Petitory action by Charles O. Chalmers against the Frost-Johnson Lumber Company, in which defendant called in warranty the Eastern Land & Lumber Company, Limited, and in which such warrantor called in warranty Mrs. Sallie W. Henry and others. Judgment for defendant, and plaintiff appeals. Affirmed.

Purser & Magruder, of Amite, for appellant. R. C. & S. Reid, of Amite, for defendant. F. S. Wels, of New Orleans, for warrantors. H. W. Kaiser, of New Orleans, for appellee Eastern Land & Lumber Co., Limited.

O'NIELL, J. This is a petitory action in which the plaintiff claims title to a tract of land in the defendant's possession. The plaintiff's claim is based upon a receipt purporting to have been issued to one Henderson Young, by William A. Gill, receiver of the

state land office, formerly located at Greensburg, La. The receipt bears date the 1st of December, 1862, and the number 5499.

The defendant's title is based upon two state patents issued to Charles W. Henry, dated the 13th of March, 1891, and numbered, respectively, 4181 and 4182, duly recorded in the state land office at Baton Rouge.

[1] The receiver's receipt No. 5499, on which the plaintiff's right of recovery depends, was never recorded in the land office, and was not filed for record in the parish in which the land is situated until the 25th of April, 1913, long after the issuance and registry of the patent to Charles W. Henry. It was proven affirmatively, not only that there was no record whatever in the land office of the issuance of the receiver's certificate or receipt for the land in contest, but also that there was no record whatever in the office of the state treasurer of the receipt of the price called for by the certificate No. 5499.

It is not necessary, however, to consider the defendant's denial that the receiver's receipt held by the plaintiff is genuine. It was not recorded in the land office when the patent issued to the defendant's author in title. Since it has been decided that patents or title deeds issued by the state or United States need not be recorded in the parish in which the land is situated—that registry in the land office is sufficient—to give notice to the public of such outstanding titles, the rule that a purchaser of real estate is not bound by an unrecorded prior sale made by his vendor of the same property must apply as well to a sale made by the state, not recorded in the land office, as to a sale made by an individual, not recorded in the parish in which the land is situated.

The judgment rendered by the district court in favor of the defendant is therefore correct.

The judgment is affirmed, at appellant's cost.

#### On Rehearing.

MONROE, C. J. The rehearing was granted herein solely upon the question, Shall the case be remanded? and the reason for granting it was that, in his application therefor plaintiff alleges that, on February 6, 1918, he learned, by chance, that some of the archives of the state land office had been taken in charge by the United States government during the Civil War; that he at once caused a search to be made in the United States land office, with the result that there was discovered the record of receiver's receipt No. 5499, dated December 1, 1862, showing payment by Henderson Young of \$40 for the land, or part of the land, here claimed, the register of receipts being signed by William A. Gill, receiver at Greensburg, as of date January 1, 1863. He further alleges:

"That both he and his counsel naturally assumed, and, until the said 6th day of February, 1918, were not otherwise informed, that all the books relating to the land transactions of the state were to be found in the land office of the state, at Baton Rouge; that neither your petitioner nor his counsel could assume, or had the right to assume, that any part of those records were missing, or, if missing, where they could be located; and that no reasonable diligence that either your petitioner or his counsel could display could or would have placed them in possession of this information but for an accident."

Counsel for defendant and appellant call the attention of the court to the following testimony, elicited from Judge Reid, then of counsel for defendant, but called as witness for plaintiff, by W. S. Rownd, Esq. (now Judge Rownd, but then sole counsel for the plaintiff), upon the trial of the case on April 27, 1914, to wit:

Judge Reid had stated, in answer to a previous question, that, according to his information, "nearly all of the receiver's receipts that were issued in 1861 and 1862, or at least a very large portion of them, were in existence, or the records of them. He was then interrogated and answered as follows:

"Q. Is it any more than fair for you to state that your information is to the effect that they are in the State Land Office?

"A. It is my information that they are in the United States land office, and, in the consolidation, those papers were carried over there; that is my information; I haven't examined them since. Let me state a little more fully. I went to the United States land office, and, in looking up some land matter, I was informed that, in the Custom House in New Orleans, were those old records. I understand now, that they are in Baton Rouge, in the land office."

Defendant's counsel also call our attention to Act 104 of 1871, section 12 of which reads:

"Sec. 12. \* \* \* That all sales and locations of public lands, made by this state, from the 1st of January, 1861, to the 14th of October, 1864, which are shown by the records of the register's office, be and the same are hereby confirmed, and patents shall, on demand, be issued in the name of the purchaser, and be delivered to the party surrendering the proof of entry or location, or on making, to the satisfaction of the register, proof of loss."

[2] While, therefore, it is no doubt true, as the present counsel for plaintiff state, that they knew nothing of the whereabouts of the missing Greensburg records until February 6, 1918, it does not appear that they ever made any effort to acquire any information on that subject, such information as they eventually acquired having come to them merely by chance, and it does appear that, nearly four years prior to that time the counsel who then had charge of the case elicited from opposing counsel, whom he called as a witness for plaintiff, that, according to his information, the missing records were at one time in the United States land office, and that "in 'the consolidation' those papers were carried over there" (meaning to the state land office). But as it appears to us, plaintiff's counsel was put upon inquiry with respect to both offices, and with that information can hardly be said to have exercised even ordinary diligence in abandoning his search, on failing to find the missing records in one of them. He should have visited the other. That, however, is not the only instance of a lack of diligence on the part of the plaintiff and his authors. In a

late brief filed by his learned counsel, we find the following:

"Henderson Young received receipt 5499, swamp land, for \$40, 320 acres of land, December 1, 1862. \* \* \* He died July 19, 1863. He left one child, Josephine, who died June 28, 1864. Mrs. Mary S. Evans Chalmers, as widow in community, owned one-half, and as sole heir of Josephine she inherited the remaining one-half. Mrs. Young was seized of right of the land. The receipt went into her trunk, where it remained until 'last March' (March, 1912)."

So that, from the death of her husband (July 19, 1863) to the institution of this suit (September 29, 1913), a period of more than 50 years, the plaintiff and his authors gave no sign that they were the owners of the land in question. In the meanwhile (in 1871), the state passed a law to facilitate those who had bought its lands, during the disturbed period between January 1, 1861, and October 15, 1864, in obtaining patents therefor, and it would probably have been easy enough at that time to have traced the missing Greensburg books, but the owner of receipt 5499 allowed it to keep its place and made no request for a patent. Then there was a consolidation of land offices, but the book in which receipt 5499 was recorded was left in the United States land office, and the officers in the state land office, keeping no record of it, in 1891 issued a patent for the land here in dispute to Charles W. Harvey, who paid his money for it, and was quite as innocent in so doing as was Henderson Young in 1862. As Young went to the proper place to buy the land, and had the right to rely upon it that he would get value for his money, so, also, did Harvey, and he was no more to blame that Young's title was not then recorded than was Young—not so much, for Young and his transferee had had 28 years in which to find out that their title was not recorded, while Harvey had no reason to suppose that the land which was sold to him had previously been sold to Young, or to any one else. Thereafter, from 1891 to the present time,

Harvey and his successors in title have paid the taxes on, and done various acts to indicate their ownership of, the land. Young and his successors for more than 50 years have paid no taxes, and do not appear to have known that they had a shadow of interest in the land. It is the opinion of the writer that plaintiff's claim is barred by the prescription of 30 years, *liberandi causa*, under articles 3528 and 3548, C. C., but, whether the court should take that view of the matter or not, it seems clear that the claim, being a stale one, is of a class which is not looked upon with favor, and that the indulgence now prayed for should not be granted.

It is therefore ordered that the judgment heretofore rendered be now reinstated and made final.

PROVOSTY, J., concurs in the decree.

(79 South. 428)

No. 23100.

STATE v. SCHIRO.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(*Syllabus by Editorial Staff.*)

CRIMINAL LAW §195(1)—FORMER JEOPARDY—SUFFICIENCY OF PLEA.

Where an information charged a maiming on January 17, 1917, defendant's plea of *autrefois acquit*, based on his acquittal of the same offense, charged to have been committed on January 20, 1917, it being admitted there was only one offense, was properly maintained.

Provosty and O'Niell, JJ., dissenting.

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; H. M. Wallis, Jr., Judge.

Joseph Schiro was informed against for maiming, and from a judgment maintaining his plea of *autrefois acquit*, the State appeals. Affirmed.

A. V. Coco, Atty. Gen., and J. A. O. Colignet, Dist. Atty., of Thibodaux (Vernon A. Coco,

of New Orleans, of counsel), for the State. Harris Gagne, of Houma, for appellee.

LECHE, J. In this case the state appeals from a judgment maintaining a plea of *autrefois acquit*. The facts are that on October 16, 1917, an information, charging the accused with having, on January 17, 1917, maimed one Angelo Gemelli, was filed by the district attorney. The following day, when called for arraignment, the accused pleaded *autrefois acquit*. With the consent of the state, this plea was tried by the judge and maintained. It seems that the accused had already been tried for the same offense on October 16, 1917, and found not guilty; hence the ruling of the judge.

The state contends in the present appeal that the offense charged in the information, filed on October 16, 1917, is not the same as that charged in the previous information, filed on October 9, 1917, and of which accused was found not guilty on October 16th, for the reason that the latter charged an offense committed on January 20, 1917, while the former charged said offense to have been committed on January 17, 1917. The state admits, however, that there was but one offense committed by the accused; that he was regularly tried therefor on October 16th; that when during that trial it attempted to prove that said offense was committed on January 17th, the accused objected on the ground that the information alleged the offense to have been committed on January 20th; and that said objection was maintained by the judge. It is further admitted that the district attorney then moved to amend the information in order to have the allegation as to time conform to the facts; that the judge having, on objection of the accused, refused to permit the amendment to be made, the state then moved to *nol. pros's*, and this, on objection of the accused, being also refused,

the state was unable to prove its case, and the accused was acquitted.

According to section 1063, R. S., and the established jurisprudence in this state, when time is not of the essence of the offense, and it is not of the essence of the offense in the present case, the state has a right to amend an information so as to state the time therein in conformity with the facts, but that rule of practice would not justify this court to reverse the ruling complained of in this case. The offense with which the accused was charged in the information filed on October 16th was admittedly the same with which he had been charged in the information filed on October 9th, and for which he was acquitted on October 16th, and to hold that his plea of *autrefois acquit* should be overruled on account of an erroneous ruling in a former prosecution would be an indefensible attempt to offset the effect of one error by committing another. To err is human. All judges are liable to err, and when they do so to the advantage of an accused, our system of criminal procedure seldom offers the state an opportunity to have the error corrected.

The plea of *autrefois acquit* was properly sustained, and the judgment appealed from is affirmed.

PROVOSTY and O'NIELL, JJ., dissent, and O'NIELL, J., hands down reasons. See 79 South. 426.

(79 South. 427)

No. 23038.

COUSIN v. SCHMIDT et al.

In re SCHMIDT et al.

(June 29, 1918.)

(*Syllabus by the Court.*)

1. VENDOR AND PURCHASER §341(2)—SALES—PURCHASER'S ACTION FOR PRICE PAID—CAUSE OF ACTION—PLEADING.

A petition alleging an agreement by defendant to sell and by plaintiff to buy a described tract of land, payments by plaintiff on account of the price, "in expectation of getting a deed

of sale some time later," and demanding a repetition of the amounts paid, subject to a credit for trees cut and removed from the land by plaintiff, sets up a passive violation of the alleged contract, and discloses no cause of action, by reason of its failure to allege that the deed was to be executed within an agreed time, and that demand had been made and defendant put in default with respect thereto.

2. PLEADING §8(11)—ALLEGATIONS—FACTS.

The allegations in such a petition that, "Furthermore, defendant was unable to give title" is not a well-pleaded allegation of fact, and means no more than, in the opinion of the pleader, defendant was unable, etc., and it will not necessarily be taken as true for the purposes of an exception of no cause of action.

3. EVIDENCE §70—TRIAL §36—PRESUMPTIONS—LEGALITY OF CONTRACT—ADMISSIONS.

Where plaintiff alleges and defendant admits that a contract was entered into between them for the purchase by plaintiff and sale by defendant of land belonging to defendant, and no issue is raised as to the form and validity of the sale, a court should rather assume that the contract was in the form required for a legal contract, since legality, rather than illegality, is presumed in such cases, and that which one litigant admits the opposing litigant is not, ordinarily, required to prove.

4. EVIDENCE §450(12), 460(3)—PAROL EVIDENCE—RECEIPT FOR MONEY PAID.

A written receipt for money paid on account for the "purchase price" of land, imperfectly described, may be supplemented by parol evidence identifying the land and establishing the amount agreed on as the price.

Certiorari to Court of Appeal, Parish of St. Tammany.

Suit by Rosemie Cousin against Lucia Schmidt and minors Cusachs, with demands in reconvention by defendants. The decree of the district court in favor of plaintiff was sustained by the Court of Appeal, and defendants apply for certiorari or writ of review. Judgment amended to reject the plaintiff's demand and to dismiss the suit, and judgment in so far as it rejected the demand in reconvention left undisturbed.

Adrian D. Schwartz, of Covington, for applicants. Harvey E. Ellis, of Covington, for respondent.

Statement of the Case.

MONROE, C. J. On April 21, 1915, plaintiff brought suit against the heirs, major and



minor, of Camille Cusachs, deceased wife of J. J. Cusachs, alleging that, having accepted her succession (the minors with benefit of inventory), they were indebted to her in the sum of \$300, for this to wit:

"(6) That, about June 29, 1907, Camille Cousin agreed to sell to petitioner, and petitioner contracted to buy from her, certain property described as: 'A portion of lot No. 1 of Sec. 45 T. 8 S. R. 13 E., Greensburg district, La., designated on a plat and subdivision of said property, as per plan of survey thereof made by Jos. Pugh, surveyor, in Nov. 1908, which plat was filed in the office of the clerk of court of St. Tammany parish, La., February 19, 1913. Said property being known as part of Mrs. Anatole Cousin's land.'"

"(8) That, in pursuance of said agreement, on the 29th day of July, 1907, petitioner paid to said Camille Cousin the sum of \$100, on account of the purchase price of said above-described property, and, on the 4th day of September, 1907, petitioner paid said Camille Cousin in the further sum of \$200 on account of the purchase price of said above-described property, in expectation of getting a deed of sale therefor some time later.

"(9) That said Camille Cousin failed and neglected to carry out said agreement, and to execute a deed of sale to petitioner for said property, or to return the amount of said \$300, paid by petitioner on account of the purchase price, and furthermore, was unable to give title to said land.

"(10) That said indebtedness is subject to a credit of \$18, the value of certain trees that were cut and removed by petitioner from said land, leaving a balance due petitioner of \$282, which is still unpaid."

And she prays that judgment be rendered for the amount last above stated.

Defendants filed an exception of no cause or right of action, which, by order of the court, was referred to the merits. They then filed an answer, admitting that they had accepted the succession of their mother, under benefit of inventory; admitting the agreement to sell and buy, as alleged; admitting the payments on account, but averring that no deed was executed "because no vendor's lien and mortgage was retained and respondents would have been without protection to have executed the sale until the purchase price was paid"; averring that they have not failed and neglected to carry out the agreement, and that they are able, and have

always been able, to give title; admitting that plaintiff entered into possession of the land and cut the trees, but averring that they are informed that the waste on the land was greater than alleged; and, becoming plaintiffs in reconvention, they again allege that they are ready, and have always been ready, to execute a valid title to the land described in the petition the full purchase price of which was \$700, and that they tender and deposit in the registry of the court a full and perfect title thereto, to be delivered by the clerk to plaintiff on payment of the balance of \$400, due on the price, with interest from the date of the tender. And they pray for judgment accordingly.

The note of evidence, taken down upon the trial, reads:

"Plaintiff offers in evidence the two receipts annexed to plaintiff's petition filed in this case.

"It is admitted by defendants that they inherited from their mother property inventoried at a much larger value than the amount sued for in this case. Evidence closed."

The receipts thus mentioned purport to be signed by "Camille Cousin," and show, respectively, payment of \$100 and \$200 "on account, being part payment on a piece of land on the east side of Bayou Lacomb, being a portion of Mrs. Anatole Cousin's land," and "on account for my land on the east side of Bayou Lacomb, being a portion of Mrs. Anatole Cousin's land." Without disposing of the exception, the trial court gave judgment for plaintiff as prayed for, and dismissed the demand in reconvention, which judgment having been affirmed by the Court of Appeal, we are asked to review that ruling.

#### Opinion.

The reasons for judgment assigned by the trial judge are as follows:

"It is a well-settled principle of our law that all contracts touching the sale of real estate must be in writing, to be enforceable. One of

the original parties to this verbal agreement has since died, and, under no circumstances, could the plaintiff maintain an action to enforce, against the heirs, the performance of the agreement made by their ancestor; therefore her only remedy is to seek to recover the amount paid on the unenforceable agreement. Defendants will lose nothing, and equity demands that the money should be refunded. No one should be permitted to enrich himself at the expense of another."

The reasons assigned by the Court of Appeal for affirming the judgment of the district court are, in substance, that, though nowhere in her petitions does plaintiff allege what price was agreed on between her and Camille Cousin, and though defendants—

"aver that the price agreed on for the property was fixed at \$700. \* \* \* defendants \* \* \* made no attempt to prove, either by parol or otherwise that \$700, or any other fixed amount, was agreed upon, \* \* \* contenting themselves with a mere tender of title, and resting their case on the record thus made up. \* \* \* The receipts, annexed to the petition, obviously embody only a part of the agreement between plaintiff and Camille Cousin, were manifestly incomplete, and were not intended to exhibit the whole agreement. The actual facts of the agreement, which were not embraced within the scope of the agreement, say, the description of the property, or the price agreed upon, could, we believe, have been shown by parol. Jones on the Law of Evidence, §§ 445, 446. Plaintiff, it is true, supplied the description which was lacking in the receipts, by the allegations of her petition but said nothing as to the 'price' of the property, which is nowhere admitted or alleged by her. Defendants made the essential allegation as to the price in their answer, but made no attempt, either by parol or written evidence, to show what it was. If parol evidence had been offered for that purpose, and denied admission by the trial court, this court would be in a position to correct the error, and to order the case remanded for the reception of the proof to show that a price had been agreed upon by the parties for the promise of sale. \* \* \*

"From the record as made up, and upon which the case was submitted, no promise to sell or contract of sale being shown, the only alternative left us is to affirm the judgment, which properly decrees plaintiff entitled to the money paid to Camille Cousin; and it is therefore affirmed," etc.

The appellate court, like the trial court, ignored defendants' exception of no cause and no right of action; and, as it does not appear to have been referred to the merits, by

the trial court, with defendants' consent, and is now insisted upon by them, we think they are entitled to have it considered.

[1-3] As her cause of action, plaintiff alleges that Camille Cousin agreed to sell, and that she "contracted to buy from her," a certain parcel of land, which she describes; that she made certain payments "on account of the purchase price of said above-described property, in expectation of getting a deed of sale therefor, some time later"; that Camille Cousin "failed and neglected to carry out said agreement and to execute a deed, \* \* \* or to return" the amounts so paid; and she prays for judgment for those amounts. She does not allege that the agreement was verbal, but neither does she allege that it was written, and for the purposes of an exception of no cause or right of action the court should rather assume that it was in the form required for a legal contract, since legality rather than illegality is presumed in such cases, and plaintiff sets it up as a legal contract. The failure to allege whether a contract that is sued on is oral or written is usually met by an exception of vagueness, and a prayer for over, where the contract proves to have been written; and the exception of no cause and no right of action, herein filed, was not leveled at that defect. It was addressed to the failure of the petition to allege that the agreement sued on contained any stipulation requiring the execution of a deed at a fixed time, and to the fact that, on the contrary, its allegation that plaintiff made a payment on account "in expectation of getting a deed \* \* \* some time later" carries with it the implication that no fixed time for such execution was agreed on, and, taken in connection with the allegation that Camille Cousin "failed and neglected" to execute the deed, amounts merely to a complaint of a passive violation of a contract, and furnishes no basis for an action, without the further allegation of a putting in de-

fault. And from that point of view we are of opinion that the exception was well taken. C. C. arts. 1911, 1933; *Livingston v. Scully*, 38 La. Ann. 781; *Robbins v. Martin*, 43 La. Ann. 488, 9 South. 108; *Johnson v. Levy*, 118 La. 451, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722. It is true that, after alleging that Camille Cousin "failed and neglected," etc., the petition goes on to allege, "and, furthermore, was unable to give title to said land," but that is mere expression of opinion on the part of the pleader. She does not state that Camille Cousin had admitted that she was unable to give the title, and the proper method of testing her ability in that respect is provided by the law, which requires that there shall be a demand in such cases, and a putting in default. We, therefore, conclude that the exception should have been maintained. But, were it otherwise, plaintiff failed to offer any evidence on the subject upon the trial on the merits, and defendants tendered a title, said to be full and perfect. Considering the point upon which our learned Brethren of the Court of Appeal have rested their decision, we find some difficulty in reconciling the conclusion reached by them with the pleadings in the case. Plaintiff alleges, specifically, that there was a contract whereby Camille Cousin agreed to sell and she to buy a tract of land, which she describes; that she made specific payments, aggregating \$300, "on account of the price," which means that there was a price agreed on; that Camille Cousin failed and neglected to carry out said agreement, and for that reason her heirs should be adjudged to return the money so paid, but that her claim therefor is subject to a credit of \$18, "the value of certain trees that were cut and removed by petitioner from said land," which is an admission that the land had been delivered into her possession—all of which is

admitted by defendants. And yet plaintiff has obtained judgment for the amount claimed merely by offering the receipts for the \$300, because defendant failed to prove the amount of the price. Of course, there must have been a price, but, as plaintiff alleges and defendants admit that payments were made and received "on account of the price," it appears to us that whether the price was one amount or another is a matter in which the courts are not particularly concerned, and that, save for the establishment of their demand in reconvention, it was a matter in which the defendants were not concerned. As the matter stands, it appears to us that defendants have been condemned by reason of the failure of proof that was not required, save for the support of the demand in reconvention, and that, in order to entitle plaintiff to recover, she should have proved affirmatively that no price was agreed on, instead of admitting, as she does, that there was a price.

[4] We agree with the learned Court of Appeals that the receipts afford written evidence of the sale, though incomplete, and that parol evidence would be admissible to establish the identity of the land and the total of the agreed price, but, as there was no issue upon the question of identity, and the admitted payments on account of the price established that a price was agreed on, we think there was error in giving judgment for plaintiff on the theory that there was no price agreed on, though the reconventional demand was properly dismissed for the failure of defendants to establish the amount thereof.

For the reasons thus assigned, it is ordered that the judgment here made the subject of review be amended, in so far as that the demand of the plaintiff is now rejected and her suit dismissed at her cost in both courts; said judgment, in so far as it rejects the demand in reconvention, being left undisturbed.

(79 South. 430)

No. 22071.

**ALLISON v. FIREMEN'S INS. CO. OF  
NEWARK, N. J.**(May 27, 1918. Rehearing Denied June 29,  
1918.)*(Syllabus by Editorial Staff.)***INSURANCE — §665(4) — FIRE INSURANCE —  
PROPERTY COVERED — OWNERSHIP.**

In an action on a binder of insurance on paintings alleged to have been destroyed by fire, evidence held to show that plaintiff did not possess the works of some of the painters whose names appeared upon his list of titles and painters submitted to insurer's agent.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Samuel J. Allison against the Firemen's Insurance Company of Newark. N. J. Judgment for defendant, and plaintiff appeals. Affirmed.

Edwin Lalzer and Charles Louque, both of New Orleans, for appellant. St. Clair Adams, of New Orleans, for appellee.

O'NIELL, J. The plaintiff appeals from a judgment rejecting his demand of \$20,000 on a binder of insurance on certain paintings alleged to have been destroyed by fire.

The defendant denies liability, alleging: First, that the plaintiff willfully set fire to the room in which he alleges the pictures were contained, or that he procured the setting fire to the room; second, that there were no pictures destroyed by the fire, because, in fact, the plaintiff did not have the pictures he pretended to insure; and, third, that the insurance binder was obtained by misrepresentation and fraud on the part of the plaintiff, not only by his pretending falsely that he possessed the pictures, but also by a false pretense that they were already insured against loss by fire in another insurance company, and that the policy was about to expire.

The greater part of the voluminous evi-

dence in the case refers to the question whether the plaintiff ever had the pictures. That question overshadows all others, because the fire occurred within 12 hours after the insurance binder was issued; and it would seem more like a miracle than like a mere coincidence, or favor of fortune, that the fire that destroyed the best evidence whether the pictures were there or not was only an accident, if the plaintiff obtained the insurance by fraud and misrepresentation, on pictures that he did not have. On the other hand, if the plaintiff really had such pictures as were represented on the list of titles and authors that he made out and submitted to the insurance agent to obtain the insurance, they were really worth a fabulous sum—were valued by him at \$58,000—and were insured for only \$27,000, all of which would be strong circumstantial evidence that he did not destroy them. The two questions, therefore, whether the plaintiff did or did not misrepresent the existence of the pictures, and whether he did or did not start or procure the starting of the fire that destroyed the contents of the room in which he said the pictures were, may be regarded as one question.

The insurance agents who issued the binder without first making an inspection of the property to be insured were misled by the statement of the agent of the plaintiff who obtained the insurance for him that the pictures were already insured in another company, and that the policy would expire on that day at noon. The plaintiff denies that he told his agent that the pictures were already insured or that the policy was about to expire. He could not have obtained the binder without an inspection, and we believe, from the evidence, that he did make the statement to his representative that the pictures were already insured, and that the policy was about to expire. Whether he did or not is of little importance beside the grave charge on which the defense rests.

The evidence against the plaintiff is, as it is in nearly all such cases, only circumstantial; but it is very strong indeed.

The plaintiff admits that no one ever saw the pictures while he owned them, except the members of his family, a priest, and a strange Spaniard whom, he said, the priest had brought to the house. At the time of the trial the priest was dead, the Spaniard's whereabouts were unknown, and only some of those of the family who were said to have seen the pictures were called to the witness stand. The plaintiff admits that no artist or connoisseur ever saw the pictures in his possession, and that no one outside of his family ever heard of his having them, except the dead priest and the unknown Spaniard, until the insurance was undertaken. The admission of those facts is of grave importance, because of the names of some very famous artists appearing on the list of the pictures furnished by the plaintiff for obtaining the insurance. In fact, according to the testimony of the art experts, the names themselves of some of the artists to whom the plaintiff attributed some of his paintings, not only cast a grave doubt, but was a positive contradiction, of the genuineness of his list. For example, two of the easel pictures, "Just Born" and "Death," valued by the plaintiff at \$14,000 on his list, were said to be works of Michelangelo on canvas. The evidence shows conclusively that Michelangelo never painted a small picture on canvas, or on anything but wood or slate, that there is not only no authenticated painting in this country by that most famous sculptor and fresco decorator, but that no dubious picture here is even attributed to him by any student of such art. Nor do such pictures as the plaintiff described in his testimony as "Just Born" and "Death" appear in any of the reliable lists of the works of Michelangelo. The fact is that the plaintiff had no paint-

ings by Michelangelo. There appeared also on the plaintiff's list Jean Francois Millet's most famous work, the "Angelus," which, however, the plaintiff credited to Wikstrom, who, according to the evidence, never painted pictures of human beings, such as the "Angelus." It appears that he attempted two such paintings, but did not finish them. The plaintiff had on his list another picture attributed to Millet, entitled "In the Dark," which he valued at \$9,000, and the evidence shows conclusively that Millet was not the author of any such picture as the plaintiff described in his testimony.

Without going further into these details, it is sufficient to say that the proof is overwhelming that the plaintiff did not possess the works of some of the authors whose names appear upon his list. That in itself would not convict him of the fraud charged in this case, because he himself, being no art expert, might have been deceived as to the authenticity of the pictures. But the evidence is quite convincing that the plaintiff knew he had no such pictures as some that were represented on his list. In the first place, his own testimony as to how, where, and under what circumstances he bought the pictures is very unsatisfactory; and the testimony he gave in that respect in his examination under oath before the insurance adjuster (in accordance with lines 87 and 88 of the New York standard fire insurance policy), seven days after the fire, was contradicted in many important points in the testimony given by the plaintiff on the trial of this case, nearly two years afterwards. He claims that he bought the paintings from his brother, paying \$14,000 for them in cash; that he had saved the \$14,000 from his earnings as a house painter, and kept the money in his residence. We might almost take judicial cognizance that it is not the average man who would or could sleep

in the same house with \$14,000 of his own real money. The plaintiff claims that his brother bought the pictures in England. He died before the fire; he had been a mechanic, and had afterwards become a bookmaker on the race tracks. The plaintiff testified that his brother brought the pictures to his house at night, in an automobile, and that he bought and paid for them without having them examined by an artist and without even looking at them himself. Seven days after the fire he testified quite positively that he bought the pictures on the 6th of August, 1912; and in his testimony on the trial, nearly two years later, he said he bought them on the 22d of December, 1911. In his examination, seven days after the fire, he testified, and repeated several times, that his brother owed him \$4,500, and that he only paid \$9,000 in cash for the pictures, "and called the deal square." He testified that he had said to himself, when he bought the pictures, that he might possibly make \$40,000 or \$50,000 on the speculation. That means that he thought they were worth \$4,000 to \$54,000; yet for two years he never thought of putting them in a safe place or having them insured. On the trial he testified very positively, and repeated several times, that he paid his brother the whole \$14,000 in cash. He testified, seven days after the fire, that he did not unpack or examine the pictures when he bought them; and on the trial he testified repeatedly that he did unpack the pictures and distribute them around the wall of the room in which he said they were afterwards destroyed by fire. In his examination before the insurance adjuster he swore that he had no record of the value of the pictures except what his brother had told him, and on the trial he testified that his brother had marked the value on each painting. The description he gave of each picture in his testimony on the trial was very much more complete and in detail than he was able to give seven days

after the fire; and it leaves a strong inference that he had made some preparation in that respect before the trial. In his examination, seven days after the fire, he described the "Angelus" as a water color picture of a nun kneeling, pulling a bell cord on the slow count. On the trial of the case he testified that the "Angelus" was an oil painting, and described it thus:

"In the distance, starting from the back of the painting was a village, then a small church as you get towards the front of the painting, and two human beings, a lady and a man, and the lady has her hands crossed on her bosom, and the man has his hat off, with his hands over his hat. Between them is a small basket, and there is a fork, like a hay fork, sticking in the ground. To the side is a little wagon or truck, or a wheelbarrow possibly, with a couple of sacks on it. \* \* \* Between the village and the fork there is a field, maybe a hayfield, as you cross between the church and the figures to the front of the picture. They had been harvesting. It looks like potatoes they have been digging. There seemed to be some in the basket, the little round basket between the lady and the man."

His description of a picture that he attributed to Millet was very different in his testimony on the trial from the description he gave in the examination a few days after the fire. In his examination, seven days after the fire, he could not possibly remember the title or description of any of the pictures by Gerome. On the trial he described the three, which he had valued at \$12,000, with the utmost detail.

We have considered heretofore only the suspicious and improbable circumstances of the plaintiff's side of the case. It must be borne in mind that he should have been better prepared to prove the affirmative, that he had owned the pictures, than was the defendant to prove the negative. The proof is positive and uncontradicted, however, that there was not a remnant nor trace of a picture in the room after the fire, notwithstanding there were remnants of such flimsy articles as Mardi Gras costumes and Japanese fans. There were also large pieces of can-

was that had been saturated with turpentine, the ashes of which might have been taken for oil paintings if the canvas had not escaped the fire. A chemist went into the room soon after the fire and gathered up all the ashes and charred remnants of what had been burned, and made a careful analysis of it, but was unable to find any element of the ingredients used in oil paintings.

The fire was confined to the one room in which the plaintiff claims the pictures were. It occurred at about 11 o'clock at night. The plaintiff went upstairs alone, and used the instantaneous heater in the bathroom, near the attic room where he says the pictures were, a short time before the fire. He admits that the fire could not have been caused by the instantaneous heater. His conduct after the fire, what he said, what he refrained from saying, and what he refused to discuss, was all very much against him. There is evidence, which, under all the other circumstances of the case, we are constrained to believe, that he hinted at a bribe to the assistant fire marshal soon after the fire, and that a few days later he told the man who had got the insurance binder for him that there would be a couple of hundred dollars in it for him if he would do all he could for him (plaintiff).

We see no good reason for incumbering this report of our opinion with a review of all of the evidence in the case. It presents only questions of fact. Our conclusion is that the suit is an attempt to perpetrate, or rather to consummate, a fraud upon the defendant. There is no occasion for rulling on the question whether the defendant was required to establish the fraud charged by proof beyond a reasonable doubt, or only by a preponderance of evidence; for we are convinced beyond a reasonable doubt.

The judgment appealed from is affirmed at the cost of the appellant.

(79 South. 515)

No. 22740.

STATE v. NEW ORLEANS LAND CO.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

1. PUBLIC LANDS  $\S$  106(1)—SCHOOL LANDS—ADJUDICATION BY LAND DEPARTMENT—EFFECT.

As between state and schools, title to fractional section of land, for all purposes of suit by state against claimant of land, must be held to be in schools; Land Department having so adjudicated title, and state not having appealed.

2. RECEIVERS  $\S$  142 — SALE OF PROPERTY — TITLE TRANSFERRED.

An adjudication at receiver's sale in suit against a city could transfer only such title to the land as the city had.

3. PUBLIC LANDS  $\S$  54(1)—SCHOOL LANDS—TRANSFER.

A private asylum for destitute girls could not transfer land of the state or of the public schools to board of commissioners of a drainage district, created by Act No. 165 of 1858, in payment of any debt it might owe, though the debt was due in part for drainage of the land.

4. STATES  $\S$  213—SALE UNDER JUDGMENT.

Sale of state's land under judgment against private asylum for destitute girls would be a nullity.

5. DRAINS  $\S$  15 — TERRITORY INCLUDED — STATE SCHOOL LANDS—STATUTE.

Land of the state, and land held by it as trustee for the public schools, was not intended to be embraced in Act No. 165 of 1858, as to formation of drainage districts, authorizing proceeding in rem without other citation than newspaper publication.

6. TAXATION  $\S$  183 — EXCEPTION OF STATE PROPERTY.

State property is impliedly excepted when authority is given to levy a tax.

7. ESTOPPEL  $\S$  62(2) — ESTOPPEL AGAINST STATE—ACTS OF DRAINAGE BOARD.

Acts of drainage board created by Act No. 165 of 1858, in acquiring state land from private orphan asylum, and transferring it to city of New Orleans, were not binding by estoppel on the state; board being mere local agency.

8. ESTOPPEL  $\S$  62(2)—RATIFICATION OR CONFIRMATION—STATUTE.

Under Civ. Code, art. 2272, providing that the act of confirmation or ratification of obligation against which law admits action of nullity or rescission is valid only when containing the substance of the obligation, mention of the mo-

tive of the action of rescission, and the intention of supplying the defect on which it is founded, an estoppel cannot be based on a legislative act which does not contain such matter.

9. ESTOPPEL  $\S$ 70(1)—TITLE TO LAND.

In the absence of assumption of responsibility for, or misrepresentation of, the title of land conveyed, there can be no ground for estoppel in that respect.

10. PUBLIC LANDS  $\S$ 54(2) — ALIENATION — LAND NOT BELONGING TO STATE—DEED OR ESTOPPEL.

Land not awarded as school land by the Land Department did not belong to the state and was not subject to be alienated by it, by direct deed or through the medium of an estoppel.

11. SCHOOLS AND SCHOOL DISTRICTS  $\S$ 15 —SCHOOL LANDS — STATE AS TRUSTEE—DIVERSION OF LAND.

The state, holding land as trustee for schools, could not divert it from its trust purpose, and transfer it to a drainage board for drainage purposes, either by direct act of donation, or through the medium of an estoppel.

12. ADVERSE POSSESSION  $\S$ 7(2) — PRESCRIPTION AS AGAINST STATE.

Prescription *acquisitandi causa* does not run against the state for its own property.

13. ADVERSE POSSESSION  $\S$ 7(2)—PRESCRIPTION—SCHOOL LANDS OF STATE.

Prescription *acquisitandi causa* does not run against the state for school land, conditional title to which was given the state by Act Cong. Feb. 15, 1843.

14. ADVERSE POSSESSION  $\S$ 43(1)—PRESCRIPTION—SUCCESSIVE OCCUPANTS.

Successive titularies of land, confident in the security of their title for more than 150 years, should not be disturbed unless the legal situation compels it.

15. PUBLIC LANDS  $\S$ 210—SPANISH GRANT—PRESUMPTION.

Actual occupancy, for more than 30 years during Spanish régime, of land now within limits of New Orleans, then within mile of limits, brought to public attention by two notarial transfers at time, may be considered to have had the tacit, if not the express, confirmation of the Spanish régime.

16. PUBLIC LANDS  $\S$ 195 — COLONIAL LAND GRANTS—CONFIRMATION ACTS.

The Acts of Congress providing for the confirmation and registry of colonial land grants refer only to inchoate titles, not to those which had matured before transfer of the colony to the United States.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by the State of Louisiana against the New Orleans Land Company. Judgment for plaintiff, and defendant appeals. Judgment set aside in part, and affirmed in part.

Chas. Louque and W. O. Hart, both of New Orleans, for appellant. Chandler C. Luzeuberg, Dist. Atty., of New Orleans, L. Robert Rivarde, Dist. Atty., of Gretna, and I. D. Moore, City Atty., of New Orleans (Wm. Winans Wall and J. C. Henriques, both of New Orleans, of counsel), for the State.

PROVOSTY, J. The board of directors of the public schools of the parish of Orleans brought suit against the defendant company to recover fractional section 16, township 12, range 11 east, as belonging to the public schools of said parish, and obtained judgment in the trial court and in this court; but, on application for a rehearing, the judgments were set aside, for the reason that it was found that the proper authority for standing in judgment as plaintiff in the suit was the state, and not the school board. Board of Directors of Public Schools of Parish of Orleans v. New Orleans Land Co., 138 La. 32, 70 South. 27. The present suit is a renewal of that suit, and has been brought by authority conferred by Act 158, p. 237, of 1910, in the interest of the public schools of the parishes of Orleans and Jefferson.

We are asked by defendant to consider again the points involved, and will do so.

The answer contains the following allegation:

"That a small portion of the property claimed in this case was acquired from Bernard Maylie, who acquired same at a tax sale for delinquent taxes assessed to the Milne Asylum for Destitute Orphan Girls, which tax sale was made more than three years before the institution of this suit, and for more than three years defendant has been in possession of the property as owner and has been paying taxes thereon."

The portion thus said to have been acquired is not further described than is here stated,



either in the petition or in the evidence; the tax deed was not offered in evidence; and this tax title is not referred to in the briefs. So that we assume the defendant is no longer relying upon this alleged tax sale for any purpose.

Defendant claims to have title under a grant made by the French or Spanish government in colonial days; and, in the event this title is not recognized, and the land is held to have belonged to the state of Louisiana, or to the public schools, then, under an adjudication made to its author in title at a receiver's sale in the suit of J. W. Peake v. City of New Orleans; and if not by virtue of the foregoing, then by prescription of 30 and 10 years; and claims, finally, that, at all events, the land cannot possibly belong to the schools, because the section and the township are both fractional, and hence that the suit must be dismissed, since the action, being petitory, comes under the principle that the plaintiff in a petitory action must recover on the strength of his own title and not on the weakness of that of his adversary. Defendant also pleads estoppel.

[1] The said township was surveyed officially, and the survey approved, in 1872. Part of its area being swamp, and therefore passing to the state by virtue of the congressional land grants of 1849 and 1850, the state applied to the Land Department to have her title under said grants confirmed. This was in 1896. The confirmation was accorded, except as to this section 18, which the department ruled was school land, and hence not to have passed under said land grants. In that decision the state has apparently acquiesced; for she did not appeal from it then, and has not done so to this day after more than 20 years. The correctness of that decision, which the state, the only party in interest, is thus not contesting, we do not see that the defendant in this case has any standing for contesting. In this respect the

case is analogous to those where the former owner of property adjudicated to the state at tax sale has been held to be without interest to inquire into the validity or nullity of a sale made of the same property by the officers of the state to some third person, without authority. *Quaker Realty Co. v. Labasse*, 131 La. 996, 60 South. 661, Ann. Cas. 1914A, 1073, and cases there cited. Rightly, or wrongly, therefore, as an effect of the said decision of the Land Department, the title, as between the state and the schools, must, for all the purposes of the present suit, be held to be in the schools.

The title by colonial grant we shall come to later. We take up now the question of whether the title of the state, individually or as trustee for the schools, was transferred to plaintiff's author in title by the adjudication at the receiver's sale in the suit of J. W. Peake v. City of New Orleans.

This point has already been decided against defendant in the cases of *Leader Realty Co. v. Lakeview Land Co.*, 133 La. 646, 63 South. 253; *Board of Directors v. New Orleans Land Co.*, 138 La. 32, 70 South. 27; *Leader Realty Co. v. New Orleans Land Co.*, 142 La. 169, 76 South. 601.

[2] Said adjudication could transfer, of course, only such title as the city had.

If she had any, it was derived through a sale made by the Milne Asylum for Destitute Orphan Girls to the board of commissioners of the drainage district created by Act 165, p. 114, of 1858; and under Act 30, p. 75, of 1871, transferring to the city, as trustee, all the real estate the said board might have title to. The asylum could, of course, transfer only such title as it had, and as to what title it had will be shown when we come to consider the alleged colonial grant.

[3] The learned counsel for defendant think that the title thus transferred by the asylum became perfected in some way in the course of, or as an effect of, the transfer to the

drainage board; because the transfer was made to satisfy a debt due by the asylum to said board under this same act of 1858 for the drainage of this and of other lands of the asylum. To our mind it is very plain that the asylum could not transfer the land of the state or of the public schools in payment of any debt it might owe, and that the fact that the debt was due in part for the drainage of this land could not make any difference.

[4] Counsel deal with the case as if a judgment had been obtained against the asylum for the assessment under said act, and the property had been seized and sold under said judgment, and adjudicated to the said drainage board. Such is not the case. But we do not see that it would make any difference if it were, for a sale of the property of the state made under a judgment against this asylum would be simply a nullity.

[5] A vague argument is made that this land, even though belonging to the state or to the schools, was liable to the drainage assessment under said act; and that therefore the title of the said drainage board to it was good. And, in support of this, the decision in *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96, is cited, where, speaking of the said act of 1858 and its several amendments, the Supreme Court of the United States said:

"There is nothing in the several statutes of Louisiana upon the subject which indicates that private property only was intended to be affected. It is true that by the act of 1858, par. 7, the district court is empowered to decree that each portion of the property situated within the drainage limits is subject to a first mortgage, lien and privilege in favor of the board of commissioners for such amount as should be assessed upon such property for its proportion of the cost of the draining; and that this was obviously intended not to apply to public property."

The said act of 1858 did not authorize a proceeding in personam for enforcement of payment of the drainage assessment which it

authorized to be levied, but only a proceeding in rem, without other citation than newspaper publication—very much after the manner in which the payment of state taxes is enforced. It is hardly possible that, by such a proceeding, the streets and public places of the city of New Orleans could have been seized and sold as private property. It may be doubtful, therefore, and we say it with all due deference, whether property of that kind was intended to be subjected to said local contribution. But however the case might stand as to that kind of property, we are very clear that the state's property and the property held by the state as trustee for the schools was not intended to be embraced in said act; for it is very evident, from the reading as a whole, that the state did not contemplate that she should be one of the "owners" of property to be proceeded against in the summary method provided for in said act; and it is very evident that the \$81,000 appropriation made by the state in said act towards the expense of said drainage was with a view to an equitable contribution by the state because of whatever state property might be situated within the area to be drained.

The Supreme Court of the United States in this *Warner* Case, even though holding that the city's property was within the act, was of opinion that obviously the city's property was not to be affected by any mortgage, lien, or privilege, or, in other words, was not to be liable to be seized and sold. Now, if this was true of the city's property, how much truer was it of the state's property, or of the property of the schools held in trust by the state. This state property could not have been seized and sold under said act of 1858, and still less could it be transferred by the asylum or by any other stranger to the title.

[6] The statute authorizing this drainage assessment to be levied made no mention of the state's property or of the property held

by the state as trustee for the public schools, and "the rule is that state property is impliedly excepted when authority is given to levy a tax." *Leader Realty Co. v. Lakeview Land Co.*, supra. See, also, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96, note.

Passing to defendant's plea of estoppel, we note that the reason urged in the brief why the state should be held to be estopped is different from that pleaded in the answer. In the answer it is that the drainage board was an agency of the state, and that therefore its acts, in acquiring this property from the Milne Asylum for Destitute Orphan Girls and transferring it to the city of New Orleans, are binding upon the state. In the brief, the argument is that Milne having by his testament bequeathed this and other lands to the Milne Asylum for Destitute Orphan Girls, and the state having by special acts (Acts 3 and 4 of 1839) chartered this asylum and authorized it to accept said bequest, recognized and ratified thereby Milne's, or the asylum's, title to this land; and, again, that the state, having by special act (Act 30 of 1871) directed the drainage board to transfer all its paraphernalia and belongings to the city of New Orleans to be held by the city in trust for the purpose of continuing the drainage work through the instrumentality of the Mississippi & Gulf Ship Canal Company, recognized and ratified thereby the title of the drainage board to this land which the board had acquired by private dation en paiement from the asylum in satisfaction of the asylum's debt for the drainage assessment upon this and its other lands.

[7] The estoppel as pleaded in the answer is not urged in the briefs. It is without merit, since the drainage board was a mere local agency, and in no sense a state agency empowered to alienate the lands of the state by estoppel or otherwise.

[8] The estoppel as argued in the briefs has more plausibility, since it is sought to be

founded upon acts of the Legislature; but in reality it is equally without merit. The said statutes cannot be said to have been confirmations or ratifications of anything, because, by express provision of Civ. Code, art. 2272:

"The act of confirmation or ratification of an obligation, against which the law admits the action of nullity or rescission, is valid only when it contains the substance of that obligation, the mention of the motive of the action of rescission, and the intention of supplying the defect upon which that action is founded."

[9] The said legislative acts did not purport to do any of these things, and did not purport to donate or otherwise alienate this land. Therefore, not having been ratifications nor alienations, they can serve as ground for estoppel only if they were representations upon which others had acted. But, before the Legislature can be charged with misrepresentation regarding the title of Milne or of the drainage board to this land, the fact would have to appear that the Legislature had knowledge of this land being included among those which Milne or the drainage board claimed to have title to; and that fact does not appear. The sole object of the statute incorporating the Milne Asylum and authorizing it to accept the Milne bequest was to carry out these purposes; and, in like manner, the sole object of the statute directing the drainage board to transfer its holdings to the city of New Orleans was to carry out that purpose. In neither of these cases was the Legislature called upon to investigate, or to know anything about, the titles to the property involved. The property was to pass just as it was, the state not assuming any responsibility whatsoever in the premises, and making no representations whatsoever; and, in the absence of either assumption of responsibility or misrepresentation, there can be no ground for estoppel. If the purchaser at the receiver's sale was misled by these acts into believing that the purpose or effect of these acts was to represent that the title of the

drainage board to this school land was good, it was because he found in these acts something not in them. But we dare say the truth of the matter is that this purchaser made his purchase without having ever heard of these old acts of the Legislature, and still less having read them; and therefore was in no way misled by them.

[10, 11] But if it were assumed that he was misled, the estoppel would have no better foundation; for, until the decision of the Land Department awarding this land to the schools and rejecting the claim of the state to it shall have been set aside, the land must be held never to have belonged to the state, and hence to have never been subject to be alienated by her, either by direct deed or through the medium of an estoppel, as land belonging to her. And, of course, holding this land as trustee of the schools, she could not divert it from the schools, its trust purposes, and transfer it to the drainage board for drainage purposes; it could no more do that through the medium of an estoppel than by direct act of donation. What one cannot do directly, one cannot do indirectly.

[12, 13] There is also something said about prescription having accrued as against the state and the schools. Prescription *acquiredi causa* does not run against the state for her own property. *State v. Buck*, 46 La. Ann. 667, 15 South. 531; 17 R. C. L. 689. Still less could it be allowed to run against the state for school land. Inherent in the state's title to such school land is a condition imposed by the act of Congress (Act Feb. 15, 1843, c. 33, 5 Stat. at L. p. 600) that the state cannot alienate same without the consent of the inhabitants of the township in which the land is situated. If, then, the state cannot alienate same by express statute to that effect without such consent, she is in no better position to do so by her laws of prescription *acquiredi causa*. The decisions cited by

defendant's learned counsel have reference to school lands in Alabama not coming under the provision of said statute.

We pass now to the consideration of the colonial grant.

In a deed executed before Andres Almonester, notary public, on July 3, 1773, Carlos Terrascon sells to Andres Jung the following:

"A plantation situated one league from this city on Bayou St. John, composed of eight arpents of ground on the front with the ordinary depth of forty, bounded on one side by another plantation of C. Bartholome and on the other side by another plantation belonging to Don Antonio Maxent."

This act contains the following declaration:

"The same is held by me by concession made to me by Mr. Aubry, French Governor, at the time of his domination, before Stan. Foucault, Commissary, as appears in the titles that he delivered to the purchaser."

And the purchaser declared:

"I accept in my favor this instrument and through it, as purchaser, the eight arpents of ground referred to, which are delivered to me to my satisfaction, but I renounce the proofs and laws of its delivery, that of the house not seen nor received, and all of such that I might give a receipt in form for."

Aubry was acting governor of the province of Louisiana from the death of D'Abadie in 1763 to the taking possession of the province by O'Reilly for Spain in 1769.

On March 8, 1774, the year following the sale by Carlos Terrascon to Don Andres Jung, the latter executed an act of sale before the same notary selling the same plantation by the same description to Mariana, free woman of color; and this purchaser acknowledged delivery of the plantation "as well as of the house, not seen or received."

Three years later, May 14, 1777, Mariana sold the same plantation to Naneta, free woman of color, as also "two cows and four calves which are situated on said plantation."

Five years later, in 1782, Naneta made her notarial will bequeathing her property to her husband Michel Deruisseaux.

Six years later, on May 25, 1788, Michel De-

ruisseaux, by notarial act, sold 4 arpents front by 40 arpents in depth of the land to James Profit and Thomas and David Urquhart.

The four arpents thus acquired by them, Profit and the Urquharts subsequently sold to Alexander Milne.

On May 20, 1804, Michel Derulsseaux sold 2 arpents by 40, bounded on one side by the land of Profit and Thomas and David Urquhart, and on the other side by his own land to Alexander Milne.

On January 25, 1804, by notarial act, Michel Derulsseaux made his will instituting his wife, Marie Noyant, his universal legatee.

On December 1, 1829, the remaining two arpents front of the original 8 arpents front was adjudicated to one Ferry at the succession sale of Marie Noyant, and shortly thereafter Ferry sold same to Alexander Milne; thus reuniting the 8 arpents front in the hands of Alexander Milne.

Milne bequeathed the property to the Milne Asylum, then not in existence, but which was subsequently incorporated by special act of the Legislature, as already stated.

The asylum, by private sale, transferred the land to the drainage board in satisfaction of the drainage assessment due by it on this and other lands, as already stated.

The drainage board, in obedience to the said act of the Legislature directing it to transfer to the city of New Orleans, in trust for prosecuting the work of drainage, all its paraphernalia and belongings, transferred this and its other lands in globo to the city; and, as already stated, these lands were sold at a receiver's sale, in the matter of Peake v. City of New Orleans, and acquired by the defendant's author in title.

The defendant has been unable to produce either the original or a copy of the document evidencing the grant to Carlos Terrascon; but accounts for the absence of the document itself and of its registry by calling attention

to the fact that the records of the registry of the deeds of that time, as well as all archives relating to land grants, were destroyed by fire in 1788, a fact established by a letter of Thomas Jefferson to Congress of date November 3, 1803 (Am. State Papers, vol. 1, Miscellaneous, Ed. of Gales and Seaton, p. 351, No. 164 of Lands and Titles), and by the following statement in Landry v. Martin, 15 La. 9 (decided in 1840):

"The archives of the province were partially destroyed in the conflagration of New Orleans, in 1788, and whatever escaped from the flames was carried away on the transfer of the province."

In this same case, the court said:

"After long and continued possession of land, for nearly half a century" (in the case at bar 150 years), "if a written grant were necessary, the testimony of witnesses, after the loss of the archives and titles, will authorize the court to presume it."

The testimony of witnesses in the instant case is lacking; but its absence is supplied, we think, by the recital in this Terrascon deed, made at a time unsuspecting, and supported by the evidence of the "titles" (either the original document itself or some duly authenticated copy of it) which the deed recites was then and there "delivered by the seller to the purchaser."

As for the possession, the rear part of the land (the part involved in this suit), consisting as it does of swamp, has, of course, never been in any one's actual possession; but the recitals in the deeds, that what was sold was a plantation, a "habitation," indicates unmistakably that the front part was actually occupied. There was evidently a house upon the land, and from the description it is evident that the lands on each side were also "plantations."

[14] There can be no doubt at all that the successive titularies of this land for more than 150 years have been confident in the security of their title. They should not be

disturbed at this late day, unless the legal situation absolutely compels it.

Plaintiff contends that Acting Governor Aubry was without authority to make grants of land, and that the Supreme Court of the United States has so held in the case of *U. S. v. D'Auterive*, 10 How. 609, 13 L. Ed. 560. That is true, but in the later cases of *Pillerin et al. v. United States*, 13 How. 9, 14 L. Ed. 28, the same court said of like grants:

"In some of these cases evidence has been offered of continued possession by the grantees of those claiming under them, ever since the grants were made. But if there has been such continued possession, and acts of ownership over the land as would lay the foundation for presuming a confirmation by Spain of these grants, or of either of them or of any portion of either of them, such confirmation would amount to an absolute title, and not an inchoate or imperfect one."

In *U. S. v. Chavez*, 175 U. S. 509, 20 Sup. Ct. 159, 44 L. Ed. 255, the court said:

"Upon a long and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory in which they are situated to the United States, and continuing after that transfer, the law bases presumptions as sufficient for legal judgment, in favor of the possessor, in the absence of rebutting circumstances, which do not exist in this case."

In *Mitchel v. U. S.*, 9 Pet. 760, 9 L. Ed. 283, the court said:

"If there could be a doubt that the evidence in the record did not establish the fact of a royal license, or assent to this purchase, as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned."

In *Strother v. Lucas*, 12 Pet. 411, 9 L. Ed. 1137, the court said:

"The unwritten law of Louisiana, before the cession of the territory to the United States, in favor of long possession and ancient appropriation, everything which was done will be presumed to have been rightfully done, and, though it does not appear to have been done, the law will presume that whatever was necessary has been done."

[15] We think that by application of these principles defendant is entitled to be quieted.

An actual occupancy which thus existed for more than 30 years, during the Spanish régime, of land well within what are now the city limits and within about one mile of what were then the city limits, and further brought to public attention by two notarial transfers made during that time, may well be considered to have had the tacit, if not express, confirmation of the Spanish authorities.

Under the Spanish law, a possession of 30 years, even unaccompanied by title of any kind, would mature into title. *White's New Recopilation*, vol. 2, p. 734.

It was the policy of the Spanish government not to oust those who had possessed for 10 years even though without title of any kind, but only to require of them, "a moderate retribution." *White's New Recopilation*, vol. 2, p. 239, art. 20.

In *Devall v. Choppin*, 15 La. 575, this court said:

"It is historically known that the Spanish government never contested the validity of the grants made by the French officers before the Spaniards took possession of the colony; that the conduct of Spain amounts to at least a tacit ratification."

[16] The objection made by plaintiff, that defendant or its authors in title never took advantage of the acts of congress providing for the confirmation and registry of colonial land grants, is inapplicable to the case, as said laws have reference only to titles inchoate, and therefore needing confirmation; not to titles which (as we hold the one involved in this case to be) had matured and become perfect before the transfer of the colony to the United States. *Pillerin v. U. S.*, cited supra.

The said colonial grant and the titles following it extend, however, no further back than 40 arpents from Bayou St. John, and therefore embrace only a part of the land in dispute. As to the remainder, the defendant has no title, and has no standing for contest-

ing in any way the title of the schools. To the extent of this remainder, therefore, the plaintiff is entitled to recover.

We have no apologies to make for having taken a different view of the title of defendant derived through this colonial grant when this case was here before, especially after fuller light has been thrown upon the matter on this second trial. Cases involving these old titles are exceedingly complicated, and perplexing to courts, or nonexperts in such matters, as witness the Supreme Court of the United States saying in the cases of *Soulard v. U. S.*, 4 Pet. 511, 7 L. Ed. 938, involving such a title, that they had kept the case under advisement from the preceding terms, and would again keep it under advisement for another term, for the reason that:

"After bestowing upon them the most deliberate attention, we are unable to form a judgment which would be satisfactory to ourselves, or which ought to satisfy the public."

The land involved in the case of *Leader Realty Co. v. Lakeview Land Co.*, and *Leader Realty Co. v. N. O. Land Co.*, 142 La. 169, 78 South. 601, lay back of the 40-arpent line, and hence the decision in that case does not conflict on the facts with the present decision. And what was there said touching the colonial grant to Carlos Terrascon was founded entirely upon what had been found by the court in the case of *Board of School Directors v. N. O. Land Co.*, 138 La. 32, 70 South. 27, as to which, as just said, we do not feel that we have any apologies to make. We can only decide cases as we see them; if upon a retrial they appear to us in a different light, we can but decide them as seen in this different light.

The judgment appealed from is therefore set aside in so far as it embraces any part of the land included within the 40-arpent line from Bayou St. John, or in so far as it includes any part of the land covered by the colonial grant to Carlos Terrascon and the

titles founded on it; and as to that part of the land the suit of plaintiff is dismissed; and the said judgment is otherwise affirmed. The plaintiff to pay the costs of appeal.

O'NIELL, J., concurs in the decree.

(79 South. 521)

No. 21178.

EBERT v. WOODVILLE et al.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

1. TAXATION ~~§~~679(1)—TAX SALE—PROPERTY ACQUIRED BY STATE.

Property acquired by the state of Louisiana at a tax sale is legally acquired.

2. TAX SALE—STATUTES.

There shall be no forfeiture of property for nonpayment of taxes, but the same shall be sold by the tax collector for the taxes due thereon.

3. JUDGMENT ~~§~~489—TAX SALE—JUDGMENT ANNULING SALE TO STATE—VALIDITY.

A judgment, annulling a sale to the state for delinquent taxes, rendered by a court without jurisdiction *ratione materie*, in a suit where the state is not a party, and where all of the taxes have not been paid, is null and void.

4. TAXATION ~~§~~682 — TAX SALE — ANNULMENT BY JUDGMENT—RIGHT OF STATE.

The state is not equitably estopped from claiming title because of a null and void judgment canceling the act of sale, or because the assessor and tax collector have continued to assess the property to the former owner and to collect taxes from him.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action to confirm tax title by Joseph F. Ebert against Mrs. John Alonzo Woodville and others, in which defendant Mrs. Woodville called upon her vendors in warranty. Judgment for plaintiff against defendant and her warrantors, and defendants appeal. Judgment amended and, as amended, affirmed.

Woodville & Woodville, of New Orleans, for appellants Woodville. Alfred D. Dan-

ziger, of New Orleans, for appellants Cohen, Rennyson, and Watermeter. Wm. Winans Wall, of New Orleans, for appellee.

**SOMMERVILLE, J.** Plaintiff alleges himself to be the owner, in possession, of vacant squares and part squares of property in the city of New Orleans, which he acquired by mesne conveyances from the state of Louisiana. The state, in turn, had title, by purchase, from Edward L. Deluzain, delinquent tax debtor, for the taxes for the year 1882. The auditor's deeds to plaintiff's author in title are dated March 1, March 12, and March 12, 1910. Plaintiff alleges his predecessors in title have had possession for more than 30 years, and he invokes the prescription of 3 years, and he asks that his title to the land be quieted and confirmed under act No. 101 of 1898. He also alleges that the tax debtor, the owner of the property at the time it was sold to the state, had transferred whatever title to or interest in said property he might have, after the tax sale to the state, to Mrs. Wilhelmina Becker, wife of John Alonzo Woodville, of New Orleans, and he asks that she be cited to answer his demand, and that he have judgment quieting and confirming his said tax titles to the property and recognizing him as sole owner thereof in perfect ownership.

Mrs. Woodville, the defendant, answered, setting up several defenses, and called upon her vendors in warranty to defend the title held by her.

There was judgment in favor of plaintiff, and against defendant and her warrantors, from which judgment defendants have appealed.

The questions presented in the case are not new. They have all been heretofore disposed of by several decisions of the court.

Defendants, on their briefs, say: "It is estoppel that we are pleading in this case,

and estoppel only." And they base their plea of estoppel upon a judgment of the first city court, city of New Orleans, wherein certain taxes, including the taxes of 1882, for which the property was sold, were ordered canceled and erased, and in which the sale to the state of Louisiana was also ordered canceled and erased from the records, and upon the further ground that the board of assessors of the parish of Orleans continued to assess the property in the name of Deluzain, the former owner of the property, and the tax debtor, after the sale to the state in 1885; and the tax collector collected taxes on those assessments for and on behalf of the state in the years subsequent to the date of the sale of the property to the state.

[1-3] It has heretofore been held that judgments by the first city court of the City of New Orleans, annulling state tax sales, were absolutely null and void, for the reason that the court was without jurisdiction to try cases involving titles to real property, and for the further reason that the state was not a party defendant in those suits, and that it was not bound thereby. Besides, the property was worth more than \$100, the lower jurisdiction of the court. There was really no suit against the state brought by the former owner of the property.

The property involved in this suit was not forfeited to the state, as argued on behalf of defendants, but was legally sold to the state for the amount of the taxes due on the property for the year for which it was sold. "There shall be no forfeiture of property for the nonpayment of taxes. \* \* \* On the day of sale he [the tax collector] shall sell such portion of the property as the debtor shall point out, \* \* \* which any bidder will buy for the amount of the taxes, interest and costs." Const. art. 233. The same provision of law was in the Constitution of 1879.

[4] The state is not estopped by the ille-



gal action of the first city court of the city of New Orleans in attempting to annul the sales to the state against the prohibition cited in the law, in a suit where the state was not a party. The judgment of the court was absolutely null and void, and it was not acquiesced in by the state at any time. On the contrary, the state sold the property to the plaintiff in this case as its property, and the state auditor gave title deeds there-to to plaintiff's author.

The state is not estopped by the acts of the assessors and the collector in assessing and collecting taxes on the property while it belonged to the state of Louisiana. The law is explicit to the effect that property in such case should not be assessed to the former owner, except for the year following the sale, during which time the former owner may redeem the property.

The equitable estoppel pleaded by defendants, based on the illegal actions of the assessor and collector, has been fully considered in several cases, and it has been held to have no application.

Counsel refer to the case of *In re Veith*, 130 La. 1108, 58 South. 899, and say:

"As we understand the position in *Re Veith*, which we here ask the court to overrule, it is that the assessor or tax collector exceeded his authority in placing the property on the tax rolls which had been adjudicated to the state."

And again:

"The time has come now for this court to correct the errors into which it fell in deciding *In re Veith*."

And defendants proceed to argue the proposition that the state is estopped from showing that the officers referred to exceeded their authority in assessing the property to Deluzain and collecting taxes from him. But the court have heretofore given fullest consideration to this proposition, and shall apply the rule of *stare decisis*, which results from the decisions, not one decision, and all to the same effect, in *Re Veith*, 130 La. 1108,

58 South. 899, *Quaker Realty Co. v. Purcell*, 121 La. 496, 59 South. 915, *Quaker Realty Co. v. Purcell*, 134 La. 1022, 64 South. 894, *Quaker Realty Co. v. Labasse*, 131 La. 996, 60 South. 661, Ann. Cas. 1914A, 1073, and to hold that the state is not equitably estopped by the actions of those officers.

In addition to the decisions of the court just referred to, the Legislature has declared the law to be:

"That after property has been adjudicated to the state in default of a bidder, as provided in section 53, the same shall be continued to be assessed in the name of the person to whom it belonged at the date of the sale until the lapse of one year from date of recording the act of sale to the state, but the tax collector shall not sell the same under the assessment and no tax shall be collected or received thereon by the tax collector of or from the former owner while said property remains in a condition of forfeiture to the state, and said continued assessment or any erroneous assessment to the former owner thereafter made and no error of the tax collector in receiving taxes under said continuous assessment or other erroneous assessment, and noncontinued possession by said property by said former owner shall ever be considered or construed by any court of this state as an estoppel of the state from claiming said property or as affecting in way the title of the state to said property or its rights to possession thereof." Section 61, Act No. 315, 1910, p. 536.

The matter has received serious and thorough consideration by the court and the Legislature, and the arguments presented in this case are not new. We adhere to the former rulings, that the state is not judicially estopped from asserting title to property acquired at tax sales under the conditions suggested by defendants.

Plaintiff did not offer evidence to show that he had title to the property firstly described by him in his petition; and his claim therefor will be nonsuited. As the New Orleans & Northeastern Railroad Company, said to be the owner of parts of the property involved, is not a party defendant, the decision of the case does not affect its title.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by striking therefrom the words

and figures, "(1) A certain square of ground bounded by People's avenue, Lafayette avenue, Agriculture and Abundance streets," and, as to the claim for that square, that a judgment as of nonsuit be entered; and, as thus amended, the judgment is affirmed. Costs of appeal to be paid by appellee.

(79 South. 523)

No. 23069.

CONROY v. PINE BELT OIL CO.

In re CONROY.

(June 29, 1918.)

(Syllabus by Editorial Staff.)

MECHANICS' LIENS  $\Leftrightarrow$  7—MECHANIC'S PRIVILEGE — IMMOVABLES — IMPLIED REPEAL OF STATUTE.

Act No. 229 of 1916, giving a privilege to mechanics, builders, artisans, workmen, laborers, etc., who shall do any work on or furnish materials for any building, etc., does not repeal by implication Civ. Code, art. 3249, specifying creditors who have privilege on immovables.

Certiorari to the Court of Appeal, Parish of Caddo.

Action by L. C. Conroy against the Pine Belt Oil Company, resulting in judgment in part for plaintiff, which was affirmed by the Court of Appeal, and plaintiff applies for certiorari or writ of review. Judgments of the trial court and of the Court of Appeal set aside in part, otherwise affirmed, with decree for plaintiff as originally prayed for.

James E. Smitherman, of Shreveport, for applicant. Kay & Plauche, of De Ridder, and J. S. Atkinson, of Shreveport, for respondent.

PROVOSTY, J. Plaintiff sues for the price of labor and materials in improving defendant's oil well, Murray No. 1, on S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of Sec. 12, T. 20 N., R. 16 W., parish of Caddo, of which land defendant had an oil and mineral lease. The trial court and the Court of Appeal gave him a moneyed

judgment. For the security of the payment of said debt, plaintiff claimed the privilege provided for by article 3248 of the Code. This the said two courts denied him; and also rejected his claim for four months' salary.

We agree that the contract for said salary was not proved; but we think the privilege ought to have been allowed.

The said article 3249 of the Civil Code reads in part as follows:

"Creditors who have a privilege on immovables, are:

"2. Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works.

"3. Those who have supplied the owner or other persons employed by the owner, his agent or subcontractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works.

"The above-named parties shall have a lien and privilege upon the building, improvements or other work erected, and upon the lot of ground not exceeding one acre, upon which the building, improvement or other work shall be erected; provided, that such lot of ground belongs to the persons having such building, improvement or other work erected; if such building, improvement or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease and shall not affect the owner."

Our brethren below thought that the entire subject-matter of this article was covered by Act 229, p. 494, of 1916, and that therefore this later legislation superseded and repealed the article. The rule with respect to implied repeal resulting from the whole subject-matter being covered by the supposedly repealing legislation is stated in 36 Cyc. 1077, as follows:

"When two statutes cover, in whole or in part the same subject-matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. Where, however, a later act covers the whole subject of earlier acts and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then consid-

ered by the Legislature, and to prescribe the only rules with respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it. If the latter statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands."

Said Act 229 reads:

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that any mechanic, builder, artisan, workman or laborer or other person, who shall do or perform any work or labor upon or furnish any materials, machinery or fixtures for any building, erection or improvements upon land, including contractors, subcontractors, materials, furnishers, mechanics and laborers, under or by virtue of any contract written or verbal, with the owner of any tract, parcel or piece of land, or with the trustee, or agent of such owner, upon complying with the provisions of this act, shall have for his work or labor performed or materials, machinery or fixtures furnished, a privilege upon such building, erection or improvements and upon the land belonging to such owner or proprietor on which the same is situated, and upon the proceeds or balance of the contract price in the hands of the owner, due or to become due to the contractor, to secure the payment of such work or labor performed, or materials, machinery or fixtures furnished. Such privilege shall be preferred to all other privileges or incumbrances which may attach to or upon the said building, erection or improvement and upon the said land, or either of them, and upon the proceeds or balance of the contract price in the hands of the owner, due or to become due to the contractor.

"Sec. 2. Be it further enacted, etc., that any person claiming a privilege as aforesaid shall file in the office of the recorder of mortgages of the parish in which the land is situated, a statement setting forth the amount claimed and the items thereof as nearly as practicable, the name of the owner, name of the contractor, name of the claimant, and the description of the property subject to the privilege, verified by affidavit. Such statement must be filed within forty-five (45) days after the acceptance of the work by the owner of the land on which work was done or his trustee or agent.

"Sec. 3. Be it further enacted, etc., that any person who shall furnish any such material or perform any such labor under a subcontract with the contractor, or as an artisan, or day-laborer in the employ of such contractor may obtain a privilege upon such lands, and upon the

proceeds or balance of the contract price in the hands of the owner, due or to become due to the contractor, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material and labor; and any artisan or day-laborer in the employ of such subcontractor may obtain a privilege upon such land and upon the proceeds or balance of the contract price in the hands of the owner, due or to become due to the contractor, from the same time, in the same manner, and to the same extent as the subcontractor, for the amount due him for such material and labor, by filing with the recorder of mortgages in the parish in which the land is situated, within the time provided in section two of this act, a statement verified by affidavit setting forth the amount due the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the subcontractor, the name of the claimant, and a description of the property on which the privilege is claimed.

"Sec. 4. Be it further enacted, etc., that all claims for privileges and rights of actions to recover thereof, under this act, shall be assignable so as to vest in the assignee all rights and remedies herein given subject to all defenses thereto that might be made if such assignment had not been made. Such assignment must be made by separate instrument of writing and such assignment is to have effect only from the date of its recordation in the office of the recorder of mortgages in the parish in which the land is situated.

"Sec. 5. Be it further enacted, etc., that any owner of any land affected by such privileges shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor; but the risks of all payments made to the original contractor shall be upon such owner until the expiration of 45 days after the acceptance of the work by the owner of the land on which the work was done or his trustee or agent, and no owner shall be liable to any action by such contractor until after the expiration of said 45 days hereinbefore specified and such owner may pay such subcontractor the amount due him from such contractor for such labor and materials, and the amount so paid shall be held and deemed a payment of said amount to the original contractor.

"Sec. 6. Be it further enacted, etc., that any privilege provided for by this act may be enforced by a civil action in any court of competent jurisdiction in the parish in which the land is situated and such right of action shall prescribe within one year from the date of recordation of the privilege in the office of the recorder of mortgages, unless renewed in accordance with law.

"Sec. 7. Be it further enacted, etc., that in all cases where the property charged does not sell for enough to satisfy the judgment rendered, with all the cost of the suit, in favor of the claimant, execution may issue upon such judgment in the same manner as an ordinary judg-

ment at law against other property of the defendant contractor.

"Sec. 8. Be it further enacted, etc., that all privileges under the provisions of this act are in full force and effect from and after the time the labor is performed, or material, machinery, or fixtures furnished.

"Sec. 9. Be it further enacted, etc., that the privilege or privileges of all persons named in section one of this act, shall be preferred to all other privileges; and no mortgage, sale transfer with a notice of privilege or privileges as hereinbefore described shall in any way defeat or impair said privilege or privileges; and no real estate shall be exempt from sale under an execution on such privilege or privileges.

"Sec. 10. Be it further enacted, etc., that in all cases where there are several privileges for labor or material furnished on the same land or property, of the same date, or which are equally just, and not enough to satisfy all claims the sale will be made and the cost paid and the money divided pro rata among the several claimants.

"Sec. 11. Be it further enacted, etc., that all laws or parts of laws inconsistent or in conflict herewith are hereby repealed except, however, that this act shall not be construed to repeal or affect the operation of Act 167 of 1912, as amended by an act adopted at this session of the General Assembly."

It will be noted that this act is a piece of legislation not confined to the matter of privilege, as is the case with said article 3249, but of much wider scope; that only the first section of the act touches upon the subject-matter of said article; that its terminology is quite different from that of said article; so much so, indeed, that the person who drafted it could hardly, while doing so, have had said article in his mind, and certainly not under his eye, for while the article uses the words "architects, undertakers, bricklayers, painters, master builders, journeymen, cartmen," and does not use the words "mechanics, artisan, laborer," the act uses the latter words and not the former, not to mention other less striking, although not insignificant, differences in expression. But this we allude to merely in passing; for the true reason why this later legislation cannot be held to have been intended to substitute and repeal the former is that it does not purport to cover the entire field occupied by the former. It provides only for

cases where there has been a contract with the owner of the land, whereas the said article of the Code provides for all cases irrespective of whether the contract was with the owner of the land or any one else, and, where the person contracted with is a lessee, accords a privilege upon this lessee's contract of lease. Because special provisions are made for the case where the contract is with the owner of the land is no reason why prior legislation providing for cases where the contract is not with the owner of the land should be repealed. The one legislation is entirely consistent with the other.

The judgment of the trial court and that of the Court of Appeal are set aside in so far as they refuse to plaintiff a privilege, and are otherwise affirmed; and it is now ordered, adjudged, and decreed that for the amount of his judgment the plaintiff have a privilege upon the lease hereinabove described, and further described in plaintiff's petition, and upon the defendant company's Murray Well No. 1, and all the derricks, machinery, piping, tubing, tanks, storehouses, attachments thereto belonging or composing same, said privilege to rank as provided in article 3249 of the Civil Code, and that the defendant company pay all the costs of this suit.

(79 South. 525)

No. 22741.

NEW ORLEANS LAND CO. v. SOUTHERN STATES FAIR-PAN-AMERICAN EXPOSITION CO. et al.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER — 273 — SALES — VENDOR'S LIEN — THIRD OPPOSITION — APPRAISEMENT.

The separate appraisal, contemplated by Civ. Code, art. 3268, where the vendor of immovable property, proceeding to enforce payment of the price, finds his claim to a privilege opposed by that of the "workmen" who have

erected a building on the land, at the instance of the vendee, need not, in all cases, be made before the sale, but may, in some cases, be made afterwards.

**2. MECHANICS' LIENS — 193 — MECHANICS' PRIVILEGES — CONTRACTOR'S LIEN — EXTENT.**

A contractor who has erected a building which was subject to a mortgage and vendor's lien can enforce his privilege only to the extent that, at the time of the sale, under foreclosure of such mortgage, the building enhances the value of the land, and neither the original cost of the building nor its value for the purpose for which it was erected have any necessary bearing upon that question.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Opposition by James A. Petty to the account of the receiver, claiming privilege on the proceeds of certain property, which was awarded to him by the district court. Judgment reversed, and judgment rendered rejecting the demands of the opponent and dismissing his opposition with the right to remove certain material within a certain time.

W. O. Hart and Charles Louque, both of New Orleans, for appellants. Sanders, Brian & Sanders, of New Orleans, for appellee Petty.

**Statement of the Case.**

MONROE, C. J. Plaintiff sold to defendant four contiguous tracts of land aggregating 87 (or perhaps 93) acres, for \$131,000, of which \$20,000 were paid in cash and the balance was represented by 111 bonds, of \$1,000 each, secured by mortgage and vendor's privilege; the act of sale containing the pact de non alienando, and certain stipulations with reference to the appointment of a receiver, the foreclosure of the mortgage, payment of attorney's fees, etc., in the event of the non-payment of the semiannual interest on the bonds; and, that event having occurred, the receiver was appointed, and at his instance the mortgaged property was seized and, after due advertisement, was adjudicated to the plaintiff company for \$16,000, which amount, save 10 per cent. paid to the sheriff, for costs,

was retained by the adjudicatee in part satisfaction of its claim, amounting to over \$126,000. Thereafter, Jas. A. Petty filed a rule alleging that, under a contract with defendant, he had erected a building on the land in question, including certain extra work, for an agreed price, aggregating \$14,752.75, of which \$12,021.15 had been paid, leaving due him a balance of \$2,731.60; that his contract had been duly recorded; that he had thereby acquired a lien and privilege, first in rank, upon land and building, securing the payment of said price and balance due thereon; and that, under the order of sale, the privileges inscribed against the property had been canceled and the holders referred to the proceeds; wherefore, he prayed that they and the receiver be required to show cause why his claim should not be paid, by preference, from said proceeds in the hands of the receiver. Plaintiff and the receiver answered that the latter would hold the funds, subject to the order of court, but that the rights of the parties could not be adjudicated until the receiver should have filed his account; after which the account was filed, showing that the claim of the vendor and the costs of the proceedings left nothing for the plaintiff in rule or other creditors. Plaintiff in rule then filed an opposition to the account, reasserting the priority of his claim and privilege and praying that the same be recognized and satisfied, in full, and in preference to all others, and:

"In the alternative, in the event the court should hold that he is not entitled to be paid the full amount of his said claim, with interests and costs, by preference and priority over said New Orleans Land Company, out of the proceeds of said sale, then that a separate appraisal be made of the real estate herein sold and of the house thereon, which was erected by opponent, and that opponent be awarded, in said account, the full sum of his said claim, with interest and costs, under the provisions of article 3268 of the Revised Civil Code, \* \* \* with recognition of opponent's first lien and privilege for the full amount of his said claim against the fund of \$16,000, the purchase price of said real estate."

The separate appraisalment was ordered and made, and the report of the appraisers reads, in part, as follows:

"(1) We find the entire tract of land \* \* \* to be conservatively worth \$100,000.

"(2) We are in doubt as to whether the instruction of the court requires us to appraise the one acre of ground on which the building in question was erected, or not; if such be desired, we appraise the same at \* \* \* \$1,500.

"(3) With respect to the value of the building erected on the said acre, \* \* \* we find \* \* \* that the contract cost of said building, plus the extras which were duly installed and approved, amounted to \$14,752.75, and we are of opinion that the said building, for the purposes for which it was constructed, was worth the said amount, as of date the receivership sale."

The appraisers, called as witnesses, testify that, while they considered the building was worth the cost price, for the purposes for which it was constructed (i. e., as the gateway to the grounds of a projected Pan-American Exposition which barely survived the period of its incubation), it adds nothing to the present value of, but is a detriment to, the land, for ordinary purposes, and as now held by the former owner and adjudicatee.

There was judgment in favor of plaintiff, and against the defendant, for \$111,000, with interest, attorneys' fees, and costs, and recognition of the vendor's lien and privilege and special mortgage on the property described in the petition; and in favor of the opponent sustaining his opposition and ordering that the account of the receiver be so amended as to recognize him as a privileged creditor in the sum of \$2,056.98, with interest, "to be paid by preference and priority over all other persons whomsoever out of the proceeds of the sale of said real estate, and that the costs of this opposition be taxed against the receiver." Plaintiff and the receiver have appealed, and the opponent has answered praying that the award be increased to the amount claimed in his petition of opposition.

### Opinion.

[1] Under the subtitle, "Of the Privilege of the Vendor of Movable Effects," article 3228 of the Civil Code reads:

"But, if he allows the things to be sold, confusedly with a mass of other things belonging to the purchaser" (debtor), "without making his claim, he shall lose the privilege, because it will not be possible in such case to ascertain what price they brought."

We refer to the article thus quoted because it has, at times, been confused with other provisions of the Code which relate to the privilege of the vendor of immovable property, and has, apparently, been considered as bearing upon the effect of the pact de non alienando, and upon the question of the necessity for appraising the improvements placed upon such property before, rather than after the sale, and upon the respective rights of the creditors claiming such improvements, on the one hand, to have the improvements sold, as well as appraised separately from the land, and of those holding mortgages, and vendors' privileges on the land, on the other hand, to have the improvements sold with the land.

The "other provisions" of the Code, to which we have above referred, are to be found in articles 3249, 3268, 3397, and 3407, to wit:

"Art. 3249 (3216). Creditors who have a privilege on immovables are:

"(1) The vendor, on the estate by him sold, for the payment of the price, or so much of it as is unpaid. \* \* \*

"(2) Architects \* \* \* contractors, \* \* \* workmen employed in the constructing, \* \* \* buildings, \* \* \* or making other works.

"(3) Those who have supplied the owner, or other person employed by the owner, his agent or subcontractor, with materials \* \* \* when such materials have been used \* \* \* in such houses or other works.

"The above-named parties shall have a lien \* \* \* upon the building, \* \* \* and upon the lot of ground, not exceeding one acre, upon which the building \* \* \* shall be erected; provided, that such lot of ground belongs to the person having such building erected. \* \* \*

"Art. 3268 (3235). When the vendor of lands finds himself opposed by workmen seeking pay-

ment for a house or other work erected on the land, a separate appraisalment is made of the ground and of the house, the vendor is paid to the amount of the appraisalment on the land, and the other to the amount of the appraisalment on the building."

"Art. 3397 (3380). The mortgage has the following effects;

"(1) That the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor. \* \* \*

"Art. 3407 (3370). The deteriorations, which proceed from the deed or neglect of the third possessor to the prejudice of the creditors who have a privilege or mortgage, give rise against the former to an action of indemnification; but he can claim for his expenses and improvements only the amount of the increased value which is the result of the improvements made."

The accepted interpretation, placed by this court upon the pact de non alienando and the above-quoted articles, construed together, is that the "pact" (which is, usually, incorporated in acts of sale, with mortgage, of real estate, but for which the law makes no special provision) does nothing more than express, in such contracts, the principle which, by the terms of C. C. art. 3397, is implied in every mortgage; that as a matter of judicial interpretation, its effect, as a contract between the parties, is defined and limited to the conferring of authority to seize the mortgaged property, in a proceeding against the original mortgagor, without notice to any third person who may be in possession; that it does not prevent the alienation of the property or deprive the alienee of any right pertaining to a third possessor, save as to the method of proceeding for the enforcement of the mortgage; and hence that the purchaser of property, subject to a mortgage containing the pact, is a third possessor within the meaning of C. C. art. 3407, and is entitled to claim compensation for his improvements to the extent that they have enhanced the value of the property; that the improvements fall under the mortgage and are subject to seizure and sale; but that equity requires that the third possessor should be indemnified to the extent that he has enhanced the value

of the creditor's security; and that, in determining the amount recoverable, the sole question is the extent to which the improvements have added to the value of the land upon which they have been placed. *Bank v. Miller*, 44 La. Ann. 199, 10 South. 779.

It will be observed that article 3268 contains no requirement as to the time at which (whether before or after the sale) the separate appraisalment shall be made nor as to whether the land and improvements shall be merely appraised separately, or appraised and sold separately; and, as the sole purpose of the article (when construed with the others that have been quoted) is to enable the workmen (or contractors, if we assume that the application of the article can be thus extended beyond its terms) to recover the amount due for improvements placed by them on the land, to the extent that the improvements have enhanced the value of the land, it is not surprising that the jurisprudence on those questions has apparently varied somewhat according to the facts of the cases in which they have been presented.

In *Andry v. Guyol*, 13 La. 8, it appears that the furnishers of material used in the construction of a building by the vendee of the land intervened, after the sale, claiming the value of the material, as a privileged debt, and that an appraisalment was then made of "the relative value of the parcel of ground, with the improvements and the buildings such as they were at the time of the sale"; which claim having been allowed by the trial court, the judgment was affirmed on the appeal. It does not appear to have been suggested that the value of the land was not, at the time of the sale, enhanced to the extent of the value of the material which had been placed on it.

In *Diggs v. Green*, 15 La. 416, a contractor had obtained judgment against the vendee of a town lot, with recognition of privilege, for labor and material furnished in the construc-

tion of a banquette and gutters, and the property, as thus improved, was afterwards sold, under foreclosure of mortgage, at the instance of the vendor to whom it was adjudicated for much less than the price at which he had sold it. The contractor intervened, after the sale, but did not pray for a separate appraisement, and it was objected that he came too late. It was found that the plaintiff had previously been informed of his claim, and had promised to pay it, and it was said by the court:

"The plaintiff, having bought in his property at a price very inferior to that he had sold it for, after having received a large amount of cash, refuses, with a bad grace, to pay a claim for improvements which greatly enhance its value."

And there was judgment accordingly.

In *Cordeville v. Hosmer*, 16 La. 590, the contractors obtained judgment, against the purchasers of certain lots, for the price of a building which they had erected thereon, and, having bought in the property at a sale made thereunder, took out a monition for the strengthening of the title so acquired, whereupon plaintiffs instituted an hypothecary action, claiming (by subrogation) a vendor's privilege for an unpaid balance of the price of the lots; and their claim was sustained by this court, speaking through Martin, J., who, after quoting Civ. Code, art. 3235 (now article 3268), held that there should be a separate appraisement of the lots and improvements, in accordance with that article, saying:

"An appraisement and sale are now, for the first time, necessary to the exercise of plaintiffs' rights as mortgagees. They have been guilty of no laches; no opportunity having been afforded them to concur in a proper and legal appraisement," etc.

In *McDonough v. Le Roy*, 1 Rob. 173, this court held that an injunction obtained by the vendee of the land, prohibiting the sheriff from selling, under a judgment obtained by

defendant, and separately from the lot upon which it stood, a building which had been erected by defendant, for the vendee of the lot, should have been sustained, saying:

"The law abhors destruction and waste; the rights of a creditor are increased by the erection of a building on the mortgaged premises; he therefore has a right to prevent an injury to those rights by the sale of the building separately from the lot, as, by such sale, it is probable that the price of the materials only would be obtained. The law therefore guards the rights of the vendor and the builder, by directing the sale of both the objects on which their privileges rest together, in order that the highest price may be obtained."

In *Succession of Lenel*, 34 La. Ann. 868, it was held that the holder of the builder's privilege, duly recorded, does not lose it by failure to have a separate appraisement of the building and land made before the sale; but that the appraisement may be made after the sale.

In *Payne & Joubert v. Buford et al.*, 10 La. 83, 30 South. 263, it was held that the vendor of sugar machinery lost his privilege for the price by allowing it to be sold, without separate appraisement and "confusedly with a mass of other things," citing C. C. art. 3228.

In *Moresi v. Coleman*, 115 La. 792, 40 South. 168, plaintiff had intervened in a foreclosure, claiming a privilege on a sugar house and one acre of ground, and had obtained an order for a separate appraisement; but the plantation had thereafter been sold without appraisement, and, at a later period (in the suit then before the court), he attacked the sale, alleging, as one of his grounds, the failure of the sheriff to make the separate appraisement.

Held, that his remedy was to have had the appraisement made after the sale, as it was shown that the seizing creditor offered to join him in so doing.

[2] We conclude, then, that the separate appraisement in this case was timely enough,



though made after the sale. But it was not the appraisal called for by the occasion. The appraisers, acting under a misapprehension, merely ascertained the original cost of the building, and reported that it was worth that amount, for the purpose for which it was erected, which information had no appreciable bearing upon the question at issue, to wit, whether the value of the land, as matters then stood, was enhanced by the presence of the building. Interrogated on that subject, they testified that the presence of the building did not enhance the value of the land, but was detrimental thereto; and no attempt was made either to obtain another appraisal or to show that the material of which the building is composed can be used or removed at a profit to any one.

That material, as we have stated, is in the form of a gateway which leads nowhere, but stands, unwelcome and uncherished, a monument to the memory of an abandoned enterprise; and, so far as we can imagine, can serve no other purpose. Should the opponent be of opinion, however, that the material can be profitably removed, we can see no good reason why he should not be permitted to try that experiment.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, and that there now be judgment rejecting the demands of the opponent and dismissing his opposition.

It is further ordered that the right be accorded to the opponent to remove the material of which the building erected by him is composed, should he think proper so to do; provided that such removal be commenced and completed within 60 days from the date upon which this judgment shall become final, during which delay he is to have ingress and egress upon and from the land whereon said building stands, for the purposes of such removal. It is further ordered that the opponent pay all the costs of this suit.

(79 South. 529)

No. 21307.

**TITLE & MORTGAGE GUARANTEE CO.,  
Limited, v. LOUISIANA ABSTRACT &  
TITLE GUARANTEE CO.**

(June 29, 1918.)

(*Syllabus by Editorial Staff.*)

**CORPORATIONS ~~§~~49(1) — USE OF SIMILAR  
NAME BY OTHERS—INJUNCTION.**

A corporation engaged in the business of guaranteeing titles, the name of which is the Title & Mortgage Guarantee Company, Limited, could not, under Act No. 267 of Acts 1914, enjoin another company engaged in the same business and known as the Louisiana Abstract & Title Guarantee Company from using the phrase "Title Guarantee Company" in its name, on the ground that it has a proprietary interest in such descriptive words.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by the Title & Mortgage Guarantee Company, Limited, against the Louisiana Abstract & Title Guarantee Company for an injunction. From a dismissal of plaintiff's suit, it appeals. Affirmed.

George C. Walshe, of New Orleans (Chas. F. Buck, J. Zach Spearing, Jas. J. McLoughlin, and E. M. Stafford, all of New Orleans, of counsel), for appellant. A. D. Danziger, J. P. Baldwin, Burt W. Henry, and Eldon S. Lazarus, all of New Orleans, for appellee.

**PROVOSTY, J.** An exception of no cause of action was sustained by the trial court to the following petition, and plaintiff's suit was dismissed:

"The petition of the Title & Mortgage Guarantee Company, Limited, a corporation organized and doing business in the state of Louisiana, domiciled in the city of New Orleans, parish of Orleans, with respect shows:

"(1) That it was duly organized and incorporated by act before C. G. Rebenitsch, notary public, in the parish of Orleans, dated March 31, 1903, with the object and for the purpose of conducting and carrying on the following described business, to wit:

"To guarantee by bond or other contract titles to real estate in the city of New Orleans,

and other municipal corporations in the state of Louisiana, and for other purposes, all of which are fully set forth in said act of incorporation, a certified copy of which is hereto annexed and filed as part of this petition.

"(2) That 1,000 shares of its authorized capital have been issued and paid for in cash at par value, making a fully paid-up cash capital of \$100,000, all in accordance with the provisions of said charter.

"(3) That immediately from and after the date of its organization and completion of sufficient stock subscription necessary, it opened offices, extensively advertised its business under its said corporate name and title, and has been and is now successfully conducting same, accordingly.

"(4) That plaintiff corporation has earned and acquired the confidence of the business community, especially that portion of it interested in transaction of real estate, and has done a fairly remunerative business having regularly earned and paid moderate semiannual dividends to its stockholders, and accumulated a fair surplus and undivided profit fund.

"(5) That your petitioner is and was of the business of guaranteeing the validity of title to real estate, a business common and successful in many of the larger cities of this country, in this city and state, and has to the extent aforesaid succeeded by careful management, patient waiting, and liberal and expensive advertising, in the newspapers and otherwise, to establish itself on a successful and promising basis.

"(6) That your petitioner has become known, reputed and spoken of and about as the 'Title Guarantee Company,' and under this designation has acquired and holds the confidence of the people as trustworthy, successful, and reliable, and has so operated and become popularly known during the entire period of its existence and active business of now more than ten years.

"(7) Petitioner now further shows that by act before A. D. Danziger, notary public, passed February 18, 1914, certain persons, to wit, P. H. Saunders, Felix J. Dreyfous, Herman Well, W. W. Bouden, Edward Wisner, Solomon Wolff, Lynn H. Dinkins, Eldon S. Lazarus, A. D. Danziger, P. M. Lamberton, M. P. Bouslog, Meyer Eiseman, Charles De B. Claiborne, F. Dietze, Jr., and others organized a corporation under the name and title of 'the Louisiana Abstract & Title Insurance Company,' with domicile in this city and parish, and by act before the same notary, dated July 13, 1914, changed the name and title of said corporation to 'the Louisiana Abstract & Title Guarantee Company,' and making certain other amendments, now forming part of said incorporation.

"(8) That the main object and purpose of said corporation, besides some incidental details, in which petitioner is not concerned, as expressed in the amended charter of July 13th, is identical in substance and intent, and provides identically for the business of guaranteeing titles to real estate as provided in the charter of petitioner, and carried on by it as aforesaid.

"(9) That since the said amendment and

change of its name and title, said corporation has and is constantly giving designed and deliberate prominence to that part of its title expressed in the words 'Title Guarantee Company' in its letter heads, publications, and advertisements, and has designated the building in which it has its offices as the 'Title Guarantee Building,' and in all its advertisements gives prominence to the words 'Title Guarantee Company,' with the evident intent to make itself known as the 'Title Guarantee Company.'

"(10) Petitioner now further shows that although its full corporate name is Title & Mortgage Guarantee Company, it is and has been during all the years of its existence in this community known, spoken of, commonly reputed and dealt with as the 'Title Guarantee Company,' which fact as well as the nature of its business was well known to many of the individuals composing the membership and stockholders of defendant corporation and particularly to its officers and organizers, as petitioner through its officers is informed and believes.

"(11) Petitioner now shows that it has acquired a property right to the title under which its business has been conducted entitled to the protection of the law against all infringement and unfair competition.

"(12) That the acts of the defendant corporation, as hereinabove set forth, constitute an unlawful infringement and unfair competition by which defendant seeks to derive benefit and advantage in its business from the use of petitioner's name at its (petitioner's) expense and to its injury and damage.

"(13) That the similarity of names as set forth is misleading and tends to confusion, and is likely to divert business intended for petitioner as the Title Guarantee Company, known to the public, the said new company resulting in what is technically recognized as unfair competition to the benefit of defendant and the injury of petitioner.

"(14) That by reason of the similarity of names instances of confusion and mistakes have arisen between the two companies and presumably are likely to happen again.

"(15) Petitioner shows that some time during the month of May or June, and during the time intervening from the date of the organization of defendant company under the name of the Louisiana Abstract & Title Insurance Company and the 13th of July, 1914, the date when it changed its name, substituting the words 'Title Guarantee Company' for 'Title Insurance Company,' certain informal negotiations were had between the officers of the two companies with a view to their possible consolidation and a proposition was orally submitted by the president of the defendant company to the president of the petitioner, for the purchase and acquisition of the stock and assets of plaintiff company, which was not accepted.

"(16) That shortly after the failure of these negotiations, the aforesaid change in the name and title of said defendant company was made. To wit, on July 13, 1914, four days after Act

No. 267 of the Acts of the General Assembly of the State of Louisiana was approved, being a general statute relative to corporations which, among other matters, not pertinent, provides:

"That the name of a corporation (about to be created) shall not be the same nor so similar as to cause confusion with the name of any other domestic corporation or foreign corporation admitted to do business in this state"; and petitioner avers that though this act had not been promulgated, the provision quoted is declarative of the policy of the state and stamps as unjust, illegal, and unfair the acts of defendant corporation herein in question.

"(17) Petitioner now shows that irrespective of the fact whether the officers and stockholders of said defendant corporation consciously acted with wrongful motive and intent, avers and charges that said conduct and acts of said corporation constitute in law a fraudulent infringement upon the rights of petitioner and unfair competition conceived and executed with the unlawful purpose and effect of trading and obtain business on the name, reputation, and good will owned and maintained by petitioner to its great injury and damage.

"(18) Petitioner shows that the rights and advantages acquired and accruing to it from the reputation and good will which it possesses and enjoys in connection with its business is of great value. It has already sustained some damage and fears and believes that it will be damaged in an amount largely exceeding the sum of \$2,500 if plaintiff (defendant) is allowed to persist in the unlawful use of petitioner's name and title and under it to continue the unfair and unlawful competition upon which it has entered and enjoy the profits of unlawful infringement.

"(19) Petitioner alleges that it made amicable demand on defendant in the premises, which met with refusal.

"Wherefore petitioner prays that the defendant corporation, the Louisiana Abstract & Title Guarantee Company, be cited through its proper officer, to appear and answer this petition, and after due proceedings there be judgment in favor of petitioner and against the defendant perpetually enjoining, restraining, and prohibiting said defendant corporation from using the words 'Title Guarantee' in the manner and form in which it now has them, and uses them as part of its corporate name and title; and enjoined from advertising itself as the Title Guarantee Company, and from designating the building in which it carries on its business as the Title Guarantee Building, and generally enjoining, restraining, and prohibiting said company from carrying on the same business as that conducted by plaintiff, under its said corporate name and title, and petitioner reserves the right to sue for such damages as it may have sustained or may hereafter suffer by reason of said act of defendant company; and petitioner prays for all such other and further aid, remedy, and relief as to the nature of the case may require, and law and equity permit; and petitioner prays judgment of all costs," etc.

Companies having as part of their names the words "title guarantee," either with or without other words, existed numerously in English speaking countries before the plaintiff company was organized. The said words are descriptive of the kind of business done by said companies. See Ency. Brit. (11th Ed.) verblis "Title Guarantee Companies"; 28 A. & E. E. of L. (2d Ed.) p. 220; see titles of cases cited in note to 38 Cyc. pp. 344 to 355. The organizers of the defendant company naturally had the right to include in the name of their company these words descriptive of their business. If any further proof were needed of these words being descriptive of that kind of business such proof would be abundantly found in Act 170, p. 398, of 1916, referring to this kind of business by that name in the provisions for its regulation. The fact that the defendant company substituted the word "guarantee" for "insurance" in its name would only go to show that the former word was thought to be an apter one for describing the business. No allegation is made that this change was from any ulterior motive. Not that such an allegation would have made any difference.

The business of the defendant company being to guarantee titles, nothing could be more natural than that it should seek to give prominence to that feature of its name. There could be harm in this only if plaintiff had a sort of proprietary interest in that kind of business or in those words descriptive of it.

The only similarity between the names of the two companies is in these words of description. The other words composing the names are different; the name of plaintiff being "The Title & Mortgage Guarantee Company," and that of defendant, "Louisiana Abstract & Title Guarantee Company."

If the building in which plaintiff carried on its business had borne conspicuously on it the name "Title Guarantee Building," and

the defendant company engaging in the same kind of business had, with more or less like conspicuousness, inscribed the same name upon its building, this perhaps might have been significant; but there is no allegation of the plaintiff's having had this name upon the building in which its offices were.

The defendant company had the perfect right to do everything the petition alleges it did.

In the case of the Car Advertising Co. v. New York Car Advertising Co., 57 Misc. Rep. 105, 107 N. Y. Supp. 547, the Supreme Court of New York said in this connection:

"The expression 'car advertising' is a general term appropriately descriptive of the business, and the authorities are to the effect that such a term cannot be exclusively appropriated by any one. In *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co.* of Kansas, 1 N. Y. Supp. 44, the court said:

"Nor could the first national bank established enjoin every other bank from using the name 'First National Bank.' Nor could the Mechanics' National Bank of New York enjoin the Mechanics' National Bank of New Jersey. \* \* \* The name 'Loan & Trust Company' is not an uncommon one as applied to certain monetary institutions. And it would seem that the prefix 'Farmers' has been applied to designate companies engaged in similar business in different states." \* \* \*

"It is plain that there has been in the past, and doubtless there will continue to be in the future, more or less of confusion and of mistakes made, such as in sending mail, telegrams, and telephone messages to the two companies. But this ought not to be held due to the act of the defendant, but rather to the act of the plaintiff, which adopted a generic and descriptive term for its corporate name without adding any distinguishing word whatever."

In the case of *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. at page 602, 9 Sup. Ct. 167, 32 L. Ed. 535, the Supreme Court of the United States similarly observed:

"'Goodyear Rubber' are terms descriptive of well-known classes of goods, produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. Thus parties united to produce or sell wine, or to raise cotton or grain,

might style themselves Wine Company, Cotton Company, or Grain Company; but by such description they would in no respect impair the equal rights of others engaged in similar business to use similar designations, for the obvious reason that all persons have a right to deal in such articles, and to publish the fact to the world. Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of the article of commerce, without other specification, create any exclusive right to the use of the name."

In the case of *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, the Supreme Court of the United States said:

"Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names, and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business, as not to palm off its goods as those of complainant, the action fails."

As the court said further in that case:

"It is not the use, but dishonesty in the use, of the name that is condemned."

And in the case of *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 168, 32 L. Ed. 535, the Supreme Court of the United States again said:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff. \* \* \*"

In the case of *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, the Supreme Court of the United States announced the doctrine of unfair competition clearly and unequivocally in these terms:

"It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principles applicable to cases analogous to trade-marks; that is to say, on the ground

of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would in a proper case constitute grounds for relief."

See, also, *N. O. Coffee Co. v. American Coffee Co.*, 124 La. 19, 49 South. 730.

Judgment affirmed, at cost of plaintiff.

(79 South. 532)

No. 21525.

**LOCAL UNION NO. 76 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA et al.**

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

**1. TRADE UNIONS §3—ACCEPTANCE OF CHARTER.**

In accepting a charter from the parent labor brotherhood, a local union did so subject to all the conditions on which it was granted as contained in the constitution and other laws of the brotherhood.

**2. TRADE UNIONS §3—LABOR BROTHERHOOD—CONTROVERSY BETWEEN LOCALS—SETTLEMENT.**

Controversies between local unions of a national labor brotherhood must be settled within the brotherhood by its tribunals in the modes provided for that purpose by its constitution and by-laws.

**3. JUDGMENT §28—EXCESS OF JURISDICTION.**

A judgment in excess of jurisdiction is not necessarily void in toto.

**4. TRADE UNIONS §3—LABOR BROTHERHOOD—JUDGMENT AGAINST LOCAL UNION—RE-SORT TO COURTS.**

Judgment of tribunal of labor brotherhood on charges of locals against another, not being null, so far as authorizing officers to sequester property of local, or as cutting off local members from brotherhood membership, until it could be reviewed on appeal, the local could not apply to the courts to arrest it or review it; that being a condition of its charter.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by Local Union No. 76 of the United Brotherhood of Carpenters and Joiners of America against the United Brotherhood of Carpenters and Joiners of America and U. S. Berry. From judgment for defendants, plaintiff appeals. Affirmed.

A. J. Peters and Wm. H. Byrnes, Jr., both of New Orleans, and Wm. J. O'Hara, for appellant. B. B. Howard and Henry O. Hollander, both of New Orleans (Joseph O. Carson, of Indianapolis, Ind., of counsel), for appellees.

**PROVOSTY, J.** Two of the local unions of New Orleans brought charges against the plaintiff union before the general president of the brotherhood. After trial, the charter of plaintiff was revoked. Plaintiff appealed to the convention of the brotherhood. Meantime an official was sent from Indianapolis, Ind., the domicile of the brotherhood, to New Orleans to take charge of the property, charter, books, and funds of the plaintiff. Thereupon plaintiff brought this suit enjoining said official from interfering with its property or affairs, and enjoining the general officers of the brotherhood from carrying out the said sentence of revocation.

Plaintiff's grounds are that there is no authority under the constitution and laws of the order for the revocation of the charter of a local union, but only for the suspension of the local union; and that the effect of carrying out said sentence of revocation would be to put the members of plaintiff out of the brotherhood, and thereby deprive them of their means of earning a living and of the insurance and other benefits of their membership; and that the appeal to the convention would be an inadequate remedy, as the date for the meeting of the convention was distant.

[1] In accepting a charter from the parent

body, plaintiff did so subject necessarily to all the conditions upon which it was granted, as contained in the constitution and other laws of the brotherhood. Among these are the following:

"The right is reserved to the United Brotherhood to regulate and determine all matters pertaining to fellowship in its various branches and kindred trades.

"The right is reserved to establish jurisdiction over any local or auxiliary unions, district, state or provincial councils whose affairs are conducted in such a manner as to be a menace to the welfare of the international body.

"The general president shall decide all points of law, appeals and grievances, except death and disability claims, and have power to suspend any local union, district council, state council or provincial council for violation of the constitution and laws of the United Brotherhood subject to an appeal to the general executive board. Any local or auxiliary union, district council, state council or provincial council which willfully or directly violates the constitution, laws or principles of this United Brotherhood, or acts in antagonism to its welfare, can be suspended by the general president with the consent of the general executive board.

"Whenever, in the judgment of the general president, subordinate bodies or the members thereof are working against the best interests of the United Brotherhood, or are not in harmony with the constitution and laws of the United Brotherhood, the general president shall have power to order said body to disband under penalty of suspension.

"The general executive board shall decide points of law, all grievances and appeals submitted to them in legal form, and their decision shall be binding until reversed by the convention.

"To make laws governing auxiliary unions, until the general convention of the United Brotherhood, in 1916, and until the same are adopted by the referendum vote of the United Brotherhood.

"If at any time a local union should withdraw, lapse, dissolve, be suspended or expelled, all property, books, charter and funds held by, or in the name of, or on behalf of said local union must be forwarded immediately by express to the general secretary, to be held in safekeeping for the United Brotherhood as trustee for the carpenters in that locality until such time as they shall reorganize.

"The officers and members of said local union will be held responsible for compliance with the above section within thirty days after such dissolution, suspension, or withdrawal, under penalty of being prosecuted by law, and forfeiture of membership and donations in this United Brotherhood.

"A member of a lapsed or suspended local union if he is in good standing can take a clearance to the nearest local union in his vicinity,

upon application to the general secretary, who shall issue same. Said clearance can be sent by mail to the nearest local union and can be accepted without requiring the personal attendance of the member."

The general president and the general executive board have interpreted these provisions as conferring authority to revoke a charter; and they, surely, were in a much better position than the civil courts can possibly be for knowing what is the true meaning or scope of these provisions. It will be noted that the third from last of the above transcribed paragraphs speaks of the expulsion of a local union. This would seem to be but another form of expression for revocation of charter. And it will be further noted that there are reserved to the brotherhood legislative powers, the extent of which is not fixed—to be exercised by the general executive board, which is a sort of legislature for the brotherhood, between the sessions of the convention.

[2] But if it be granted that there was no power to revoke a charter, what then? Plaintiff's learned counsel concedes, as he must, that controversies of this kind must be settled within the brotherhood, by the tribunals, and in the modes, provided for that purpose by the constitution and laws of the brotherhood; but he contends that there are exceptions to that rule, one such exception being where a judgment has been rendered by the brotherhood tribunals without jurisdiction, and no adequate remedy is afforded by the laws of the brotherhood against the effects of such judgment.

[3, 4] We readily concede that a judgment rendered without jurisdiction is null, or, legally speaking, no judgment; and that any attempt to enforce it may be arrested; and we may concede, also, that when such a null judgment has been rendered by the tribunals of a mutual benefit society, and the laws of the society afford no adequate remedy for arresting its effects, the civil courts may be

applied to for that purpose. But a judgment in excess of jurisdiction is not necessarily void in toto. On the principle that the greater includes the less, it may be valid in so far as within the jurisdiction and as such susceptible of execution. 23 Cyc. 682. Thus, where there was authority to pronounce only interlocutory judgment of separation, and the court entered a final decree of divorce, the judgment was good as an interlocutory decree. *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897. Especially must this conservative doctrine be held to be applicable to trials within fraternal organizations where the proceedings are conducted by laymen and necessarily are emancipated from all mere technical rules. Obviously, the substance alone need be looked to in such cases. Now, under the above-transcribed provisions, the effects of a judgment of suspension would be exactly and precisely the same as those of a judgment of revocation, so long as the suspension continued. As an effect of the suspension, the charter of the local union would be taken away from it, and its property sequestered, and the members would have to seek admittance into other local unions, precisely as in the case of a revocation of charter. The learned counsel for plaintiff says that with the clearance cards issued, or offered to be issued, to the members of plaintiff after this judgment of revocation, these members could have entered another local union only by permission of this other union, to be expressed by a majority vote of its members; but the same thing precisely is true with clearance cards issued after a judgment of suspension. The only provision we find relating to entrance into another local union upon a clearance card applies equally to cards issued on suspension. It reads:

"On entering a local union a member with a clearance card shall present his due book to the

president, who shall appoint a committee of three to examine the applicant and his due book and report at once. If clearance card and due book are found correct, then a vote shall be taken, and if the majority of the votes are favorable he shall be admitted, except in case of strike or lockout, provided he qualifies in accordance with the district by-laws."

The said judgment not being null in so far as it operated to authorize the general officers of the society to take charge of the property, charter, books, and funds of the plaintiff, and in so far as it cut off the members of plaintiff from membership in the brotherhood until it could be reviewed on appeal, plaintiff was without ground to apply to the civil courts to arrest its operation, or to review it, but had to submit to it; such being one of the conditions on which plaintiff accepted its charter. And that was the conclusion reached by the trial court.

Judgment affirmed.

O'NIELL, J., takes no part.

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(79 South. 533)

No. 21660.

BAENSCH v. HEINICH et al.

(June 29, 1918.)

(*Syllabus by the Court.*)

DESCENT AND DISTRIBUTION ~~83~~—SUCCESSION—CONSPIRACY OF COHEIRS—REMEDY OF HEIR.

Where certain of the heirs conspire together to appropriate to themselves the property of the estate to which they succeed, and carry their conspiracy to successful execution, to the exclusion of their coheir, such coheir, though he may not demand the more severe penalty imposed by law, is entitled to such judgment against the wrongdoers, in solido, as will insure him his share of the inheritance.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit by Peter Baensch against Mrs. Gertrude Heinrich, Mrs. Henrietta Lafon, and others, to recover his interest in their moth-

er's succession. Judgment for the plaintiff against the defendant Mrs. Lafon in a certain amount, and otherwise dismissing the suit, and plaintiff appeals. Judgment annulled, and judgment rendered for plaintiff against defendants in solido, decreeing plaintiff's interest in an inheritance, ordering a partition, and adjudicating his interest in furniture, household effects, etc.

E. M. Stafford and H. W. Robinson, both of New Orleans, for appellant. George E. Williams and N. E. Humphrey, both of New Orleans, for appellees.

#### Statement of the Case.

MONROE, C. J. Plaintiff, as one of the five children and heirs of Mrs. Theresa Baensch, widow, brings this suit against his three sisters, Mrs. Heinrich, Mrs. Ernst, and Mrs. Lafon, to recover his interest in their mother's succession, which, he alleges, they have conspired to appropriate, and have appropriated, to themselves. The fifth heir, Frederick Baensch, is not a party to the litigation. After disposing, as we think, properly, of several exceptions, and hearing the case on the merits, the trial court gave judgment for plaintiff, ordering Mrs. Lafon to account for a certain sum of \$1,500, belonging to the succession and admitted to have come into her possession, and otherwise dismissed the suit. Plaintiff alone has appealed.

The facts, as we find them disclosed by the evidence, are as follows: The decedent was an elderly woman, having grown grandchildren, and, some three years prior to her death, which occurred on November 26, 1912, had suffered a stroke of paralysis, after which she remained at home, and for some time prior to her death, probably in bed. On August 29, 1911, while still at her own home, on Cleveland avenue, where she had lived for many years, she sold that property for \$4,100, of which \$3,000 were paid in cash,

and the balance, of \$1,100, in three notes, of \$366.66 each, payable in 1, 2, and 3 years, respectively, and secured by mortgage, which notes, it is said, were at once converted into cash. Mrs. Lafon, who lived in the house, and Mrs. Heinrich, who was there at the time, testify that they do not know what became of that money, and that they made no inquiry upon the subject. Mrs. Ernst says that she made some inquiry of Mrs. Lafon, who had no information to give her, and she appears to have been satisfied. Plaintiff and his brother had not visited their mother for some time, and saw little or nothing of her until after her death. It is shown that, upon the day of the sale thus mentioned, the three daughters rented a safety deposit box in the vault of the Whitney Central Bank & Trust Company, from which they afterwards produced considerable money for investment, or expenditure, for their own purposes; and it does not appear that, prior to that time, either of them, save Mrs. Heinrich, had ever had occasion to rent such a box, nor, unless it was intended to be used for the safe-keeping of the money and notes received, as stated, by their mother, does it appear that they had such occasion at that time.

On December 23, 1911, while residing at the home of Mrs. Ernst, Mrs. Baensch sold to Camille Lafon, brother-in-law of Mrs. Lafon, the defendant herein, and son-in-law, as we infer, of Mrs. Ernst, for \$3,000 cash, three improved lots owned by her on Ann street, and, the check of the purchaser having been given to Mrs. Heinrich for collection, she obtained the money, and says she delivered it to Mrs. Baensch, in the presence, she thinks, of Mrs. Lafon. But neither she nor Mrs. Lafon, nor Mrs. Ernst, were able to say what thereafter became of it, though they denied that it had come into their possession and averred that they had never even attempted to learn why it was not found after their mother's death. On November 19, 1912, Mrs.



Baensch executed an act of sale whereby, for a recited consideration of \$1,500 cash, she conveyed to her three daughters the last piece of real estate that she owned, being an improved lot on Palmyra street. She was then an inmate of Mrs. Lafon's home, where the act in question was executed, and the three defendants testify that they were all present, and that each of them paid, in cash, the \$500, representing her proportion of the price of the property. The notary, before whom the act was executed, and the two subscribing witnesses testify that no money was paid. Mrs. Lafon says in her testimony that her mother took the \$1,500 and kept it in the bed with her until she died, seven days later, and told her that she (Mrs. Lafon) was thereafter to pay such debts as she (Mrs. Baensch) might leave, and divide the balance of the \$1,500 with Mrs. Ernst, to compensate them for nursing her, and that, after her mother's death, she paid the expenses of her last illness, funeral, and some other debts, including a bill for repairing the roof of the Palmyra street house, the whole amounting to \$944, leaving a balance in her hands of \$556; that she had not given Mrs. Ernst her share of that balance because Mrs. Ernst had told her to keep it until she needed it.

It is shown that, within three months after Mrs. Baensch sold the Cleveland avenue property, and defendants rented the safety box, Mrs. Lafon, aided by her husband, bought improved property on Cortez street for \$5,000, of which \$1,700 was paid cash, and the balance by her note at one year, secured by mortgage, for \$3,300. On February 21, 1912, within about two months after the sale by Mrs. Baensch, for \$3,000 cash, of her property on Ann street, Mrs. Heinrich paid off a mortgage of \$1,000, which, on February 20, 1911, she had imposed, as security for a loan of that amount, on certain real estate which, in 1910, her husband had caused to be placed in her name. On March 16,

1912, Mrs. Lafon, by that time a widow, bought from V. Leonard, two lots on Banks street for \$1,800 cash. On August 23, 1912, the Mesdames Heinrich, Ernst, and Lafon bought from William Dunn an improved lot on South Clark street for \$3,500 cash. On November 19, 1912, the defendants bought from their mother her improved lot on Palmyra street for \$1,500, as heretofore stated. On April 14, 1913, Mrs. Lafon paid her mortgage note for \$3,300, and the mortgage was canceled. According, therefore, to the undisputed evidence, omitting the notarial act purporting to show the purchase by defendants of the Palmyra street property, Mrs. Lafon is shown to have invested, between August 29, 1911, the date of the first sale by Mrs. Baensch, and April 14, 1913, \$7,966.66, and if we add thereto the \$944, which she says she used in paying Mrs. Baensch's debts, funeral expenses, etc., we have a total of \$8,910.66 expended by her within that period; and in that connection we may add that she testifies that there is a double tenement house on the Banks street lots, one side of which she rents and the other side occupies, and that the property is worth \$4,800, from which it would appear that she has improved the lots since she bought them, since it seems hardly probable that they would otherwise have appreciated in value from \$1,800 to \$4,800 in so short a time. Leaving that question as it stands, we find that Mrs. Ernst, between August 29, 1911, and November 26, 1912, the date of her mother's death, invested \$1,166.66, or, if we include the \$500 said to have been paid for a one-third interest in the Palmyra street property, \$2,166.66, and that Mrs. Heinrich made investments, including \$1,000 paid for the release of a mortgage, and the \$500 said to have been paid for her interest in the Palmyra street property, amounting to \$3,166.66.

As to the sources from which the money thus invested or expended is said to have

been derived, we find as follows, mainly from the testimony of the defendants, to wit:

From the testimony of Mrs. Lafon, it would appear that, in 1908, she was married to August Lafon, who was without means at that time, but could get money from his father when he needed it. His father had started him in the dairy business, which he was then carrying on. It lasted a year or more, when he sold it. She does not know what he did with the proceeds. His father then started him in business as a butcher, which lasted a year and a half, perhaps longer, when he abandoned, or sold, that business. His father would give him money to start a business, and he would sell the business and use the money for other purposes. After he abandoned or sold the butcher business, his father bought him an ice wagon, shortly after which, as we infer, his father died, and the ice peddling business also soon expired, followed, on December 8, 1911, by the death of August Lafon himself, leaving his widow, with one child, issue of his marriage and an estate manifestly just inherited from his father, appraised, December 28, 1911, at \$2,216, and composed of the following items, to wit: One note for \$1,000, with interest paid to February 15, 1911, and extended to February 15, 1912; one note, originally for \$8,966, but reduced by payments on account to \$966, past due, with accrued interest, appraised at \$966; a one-third interest, valued at \$250 in a lot on Scott street. Mrs. Lafon testifies that she had saved, at the time of her marriage, \$800, from her earnings in teaching music, and that her husband's uncle had given her \$500 and her aunt \$500, and she speaks vaguely of other moneys that were given her. She did not deposit her money in bank, but kept it at home, and states that she so kept it until she deposited it in the safety box which she and her sisters rented on August 29, 1910. She seems to convey, or to intend to convey, the idea that she was authorized by the court

to invest the proceeds of the notes inventoried in the succession of her husband in property purchased in her own name. Thus in the course of an examination by her own counsel her attention was called to a memorandum, apparently made by her, and she was asked certain questions concerning it, to which she made answer that it showed the property on Clark street, "\$500 for the Palmyra street property," and the examination proceeds:

"Q. I asked you what property, other than real estate, you got from the succession of your husband, not the real estate there, notes, money, or anything else. A. I got a note for \$1,000, and I haven't got the interest here (meaning on the memorandum)—it is \$70—and one note of \$966, and interest on that, \$500, with the interest, \$1,605 (evidently a miscalculation) for the note. Q. That is the amount you realized on those notes? A. Yes, sir. Q. What did you do with that money? A. Which money? Q. That you realized on those notes? A. I helped buy that property on Clark street. Q. It helped buy that property on Clark street? A. Yes, sir; and, as I told you, I got money from music lessons. Q. When you referred to your money with which you purchased this property, is that the money you spoke of? A. Yes, sir. Q. Accounted for here? A. Yes, sir. \* \* \* Cross-examined: "Q. Mrs. Lafon, part of the estate of your husband belongs to your child? A. Yes, sir. Q. Referring to the \$1,000 note, the \$966 note, and the \$500 interest on the note, what do those three first items you called out—do they belong to the minor or to you? A. Part to me and part to the minor; and the court granted me the use of it for the child. Q. Now, this \$1,605; that is notes? A. Yes, sir. Q. Does that belong to you or to the minor? A. I don't know who it belongs to, me or the minor. Q. That is succession property? A. That is not succession property; Mr. Walker didn't put it in. Q. It came from the succession? A. Yes, sir. \* \* \* Q. The child's interest, according to your idea, is only in those items of cash and notes and the interest on the notes? A. Yes, sir; the child has no interest in the real estate. I took the money and paid for it. The court allowed me that, and I bought the property with it."

Elsewhere she testifies that her husband gave her the Cortez street property; i. e., the three lots purchased by her on November 25, 1911, for \$5,000, of which she paid \$1,700 cash, and for the balance, of \$3,300, gave her note, which she paid April 14, 1913, 17

months after the death of her husband. The memorandum, referred to in the foregoing testimony, reads as follows:

Doctor .....	175.00
Funeral .....	400.00
Roof .....	165.00
Church .....	35.00
Dr. Borey .....	75.00
Nurse .....	34.00
Shroud .....	25.00
Drugs .....	20.00

920.00

Wake ..... 15.00

944.00

Property bought by me and accounted for:

4,800.00 lot and house on Banks St.  
1,166.00 Clark St.  
500.00 Palmyra St.

6,466.00

1,500.00

944.00

556.00 from mother amount of 1,500.00

Amount rec'd from succession of August Lafon:

1,000.00 notes.

966.00 notes.

500.00 int. on notes.

1,605.00 from note.

4,071.00 cash gotten from succession.

6,466.00

4,071.00

2,395.00

800.00 had from lessons.

1,595.00

500.00 Mr. G. Lafon.

1,095.00

500.00 aunt gave me.

595.00

In her testimony she arrives at the figures 1,605.00, by adding to the amount of the \$966 note the \$500 of alleged accrued interest, which, however, should make \$1,466. In the memorandum, she adds the 1,605.00 to the 966.00 and the 500.00, and, with the 1,000.00, makes 4,071.00. She does not account for the possession of the \$3,300, with which, on April 14, 1913, she paid the balance of the purchase price of the Cortez street property, nor, save by the statement

that her husband gave her that property, does she account for \$1,700 with which she made the first payment thereon, less than a fortnight before the death of her husband.

Mrs. Ernst, according to her testimony, had been married 25 years, had two children, one of them married, to Camille Lafon as we take it. Her husband at the time that she testified was keeping a saloon; had been keeping it 2 years; had previously kept saloon and grocery for 20 years; had never owned the building in which the business was conducted; but did own properties on White and on Banks streets, which he had bought 8 or 9 years before. One place is worth \$1,800, or \$2,000; the other \$1,600 or \$1,700. One place he bought on time, and paid so much a month; the other he bought through the Homestead. In 1913, also, the Homestead built a house for them on Hamilton street. During those years, while her husband was paying, month by month, for the properties mentioned, and prior to that, she received \$5 per week for her services in the grocery, and also made money by selling old sacks, boxes, and barrels. She first deposited her money in the Germania Savings Bank, and afterwards in the Interstate Bank. The most that she ever had in the bank at one time was about \$300, or a little more. She even used that, and other money, in buying property, with her sister. The other money was money that she had at home; always had \$2,000 there; did not always have it, but saved it up. Being asked where the money came from with which the South Clark Street property was paid for, she answered that she gave Mrs. Lafon, \$1,166 of her money that she had worked for; that she did not have it in any bank; that it was not kept at home; that she did have it in the Whitney Bank, with Mrs. Heinrich and Mrs. Lafon; that she had about \$1,800 there; that just before going to California, which she did in the latter part of August,

1911, she gave Mrs. Lafon \$1,900, and told her, "when she got ready to go to the bank box," to put it in with hers; that she worked for that \$1,900, and her husband gave her some of it; that she had at one time over \$2,000; that she took \$300 with her on her trip to California. She does not fix the exact date of her departure for California, though she was asked several times when she left here, her answers being the latter part of August, 1911, so that it may have been upon the morning of the 29th of August or the evening of the day before; nor does she say how or why it happened that she and her sisters should have agreed in advance that on the 29th they would rent the bank box and keep their money in it together, or why they did not rent it before she left the city. From a statement from the Germania Bank (Commercial Germania Trust & Savings Bank), it appears that Mrs. Ernst never had an account in that institution, and a statement from the Interstate Bank shows that the largest amount she ever had on deposit there was, on July 11, 1911, \$247.92.

Mrs. Heinrich's husband was a cistern maker, but in 1910, his establishment was destroyed by fire, and he seems, about that time, to have found some reason for putting his property in the name of his wife. She testifies that he sold some lots on Blenville street for \$8,000 or more, which he turned over to her and she kept in a bank box, and in September, 1910, he conveyed a lot in square 581 and two lots in square 730 to Peter Baensch, for the recited consideration of \$5,500, of which \$3,400 were said to be paid in cash, and the balance, of \$2,000, by the assumption of a mortgage already resting on the property, and on the same day, before the same notary, and for the same recited consideration, Baensch conveyed the same property to Mrs. Heinrich. On February 20, 1911, Mrs. Heinrich mortgaged the

property thus conveyed to secure payment of \$1,000, which she then borrowed, to meet the expense of establishing a fishing camp, in which her husband had then embarked and is still operating, from which it may fairly be inferred that whatever money had previously been intrusted to Mrs. Heinrich by her husband had been expended. Mrs. Heinrich was asked why she rented the bank box with her sisters in 1911, and she replied, "I guess we got and paid for it about the time we needed it, when we thought we needed it." She further stated that she herself had a box in another bank at that time; that the money that she put in the Whitney bank box came from her husband; that it was between \$1,000 and \$2,000; that her husband gave it to her at different times; that he gave her everything that he made, just as we make it, etc.

John R. McMahon, testifying in 1915, said that, several years before, Mrs. Heinrich had told him that her brothers were away from the family and had never done anything for their mother, and that the property should go to the girls; that she told him at another time that she had taken \$1,000 from the bank box, which she and her sisters held together, to pay off a mortgage, and that Mrs. Lafon and Mrs. Ernst wanted her to account to each of them for one-third of the amount so taken; that Mrs. Lafon had told him that she had taken money out of the bank box with which to make payments on property purchased by her; that the box was in her mother's name; that she wanted Mrs. Heinrich to give her her share of the \$1,000 that she had taken out of the box.

Peter Baensch, plaintiff, testifies that, in 1912, he had a conversation with Mrs. Ernst at her house, and she told that she did not see why their two sisters had not given him his share of the property; that they had taken the money from the cash box and did not want to give her her share; that she

was willing to give him his share; that the property had been transferred in order to keep him from getting anything; that the Palmyra street property had been so transferred, and nothing had been paid for it; that the sisters had taken the proceeds of the Cleveland avenue property to the extent, as he thought, of \$3,600, and bought the Clark street property with it (the South Clark street property was bought for \$3,500); that the \$3,000 received for the Ann street property had been put in the box, and that thereafter Mrs. Heinich had taken \$1,000 with which to pay off a mortgage, and that there was about \$1,800 left in the box which Mrs. Lafon used to finish paying for her house on Banks street. He further testified that Mrs. Heinich, after the death of their mother, came to the shop, where he was working, and said to him, "There's no use for you trying to get anything, because we got it fixed so you ain't going to get nothing;" that he had not seen his mother for, say, a year before her death, and, as may be inferred, did not see her until after her death. It is conceded that Mrs. Lafon and Mrs. Ernst, between them, succeeded to all of Mrs. Baensch's furniture, jewelry, and other personal effects, and an informal offer, of sorts, was made on the trial, to turn it over to plaintiff, but, as the property had been scattered about a good deal and not collected together again such an offer could hardly have been made good, if accepted.

#### Opinion.

The evidence convinces us that the defendants deliberately conspired together to appropriate to themselves the estate of their mother, to the exclusion of their two brothers and coheirs, and carried their conspiracy to successful execution. The delivery into the hands of the mother of the proceeds of her Cleveland avenue and Ann street properties, amounting to \$7,100, was, in effect, a

delivery into the hands of those who had charge of her, and their denials that any part of those funds came into their possession, and that they made no inquiry, or merely formal inquiry, concerning them, are, in the light of the surrounding circumstances, impossible of belief.

The circumstances are set forth in considerable detail in the preceding statement, and a few only of the salient ones need be here recapitulated. Mrs. Baensch was old, partially paralyzed, and comparatively helpless, and lived at an expense not exceeding \$20 or \$25 a month. Her daughter Mrs. Lafon lived in the house with her, and her daughters Mrs. Ernst and Mrs. Heinich were her constant, and perhaps only, visitors. They were therefore bound, by every consideration of interest, as well as obligation, to see to it that her property should be neither lost nor squandered, and it would exceed the bounds of credulity to believe that two amounts of \$4,100, and \$3,000, which they knew came into her hands at intervals of several months, disappeared within the short period which intervened before her death, without their knowing what became of it, or at least exhibiting some curiosity upon the subject, after her death. In that connection, it may be remarked that, save in the act of sale, the record contains no information concerning the disposition of the three notes that were given in part payment of the price of the Cleveland avenue property, and we learn only through an unchallenged statement in the brief of defendant's counsel that they were, at once, converted into cash. As we take it, however, Mrs. Baensch was not in a condition to transact that business, and the inquiry suggests itself, Why and for what reason, and by what authority, and by whom, were the notes so converted? A partial answer would seem to be that cash may more readily be disposed of, without leaving traces, than notes, which must be paid by one person and collected by another, and that, if the pro-

ceeds of the Cleveland avenue property were to be disposed of, to the exclusion of Mrs. Baensch's two sons, it was necessary that it should be done speedily, and not await the maturity of the notes. For the rest, it is to be presumed that the notes were reduced to cash by those who were interested in having them discounted, and upon their own authority. In view, then, of the fact that approximately \$4,100 was to come, and did come, into the feeble hands of Mrs. Baensch on August 29, 1911, it is evident that the interests of the defendants, not to mention their obligation, demanded that some arrangement should be made for its safe-keeping, and it is an undisputed fact that, upon that same day, they united and rented the deposit box in the vault of the Whitney Bank, and there was an impression, somewhere, at the time or afterwards, that it was rented in the name of their mother. It appears, however, that it was rented in their own names; that Mrs. Lafon, who from the days of her youth, during the vicissitudes of her married life, to a husband who had failed in everything that he had undertaken, and notwithstanding that she had been subjected to the travail and expense of motherhood and of the care of an infant, had saved \$1,800 or more by keeping it securely at home, conceived for the first time the idea that she needed a bank box; that Mrs. Ernst, who for 19 years had assisted her husband in his grocery business, during the greater part of which time, he had been buying small properties by small monthly payments, and who had been paid \$5 per week for her services, besides making a profit by the sale of old sacks, boxes, and barrels, and, from her earnings had saved, for the most part, by keeping it at home, \$2,300, suddenly concluded that she, too, must have a safety deposit box; and that Mrs. Heinrich, who less than six months before had mortgaged the property which her husband had caused to be put in her name, in order to borrow \$1,000 wherewith to pay their expenses,

which debt was still unpaid, reached the same conclusion, though she then had such a box, which, for aught that appears, was large enough for her requirements. And so they rented the box. But if the reasons which they give in each case appear inadequate, their reasons for renting a box in common are more so; in fact, they give no reasons for that at all, although boxes of that kind are most frequently made the receptacles of papers or mementoes which, by reason of their intrinsic value or otherwise, are not submitted to the inspection of others. In the absence of explanation therefore—and there is none—it seems incomprehensible that, after, as they say they did, hoarding their savings separately, they should, without apparent reason, decide to put them together, in the same box, and that, as the evidence shows, a box with but two keys; and more incomprehensible still is the fact, that, though the box was rented upon the same day that their helpless mother, living in the house with Mrs. Lafon, and constantly visited by the others, received \$4,100 in cash, they do not admit, but deny, that it ever entered into their contemplation that the money so received should be deposited in their box. As we see the matter, however, unless in renting the box they had in view the safe-keeping of the money so received by their mother, they are so entirely abnormal as to defy classification. Conceding that they felt under no obligation to their mother or to their absent coheirs with respect to the safety of the fund in question, they themselves were interested in that fund, as the heirs of their mother, whose days were numbered, and the normal individual will usually care for that which belongs to him, whether in present or futuro. The fact that, as their mother, in quick succession, sold for cash, which immediately vanished, the several pieces of real property of which she was the owner, her daughters acquired property, and that, instead of opening her succession,

when she died, in the house of Mrs. Lafon, as it was the imperative duty of Mrs. Lafon to have done, that lady left the succession unopened while she and her sisters appropriated all the personal property belonging thereto, without giving their brothers an opportunity to be heard upon the subject, is not only significant in itself, but is strongly corroborative of the direct testimony of plaintiff and McMahon, as is also the circumstance that some of the facts alleged in the petition and supplemental petition, and proved beyond controversy on the trial, could only have come to the knowledge of plaintiff in the manner testified to by him and McMahon, i. e., by means of statements made by one or the other of the defendants.

As between the alternatives, then, and without further extending this opinion, we conclude that defendants are normal, in the sense that they contemplated putting the \$4,100, received by their mother from the Cleveland avenue property into the box in question, and that they did as they contemplated. We further conclude that they thereafter withdrew that money from the box and used it for their own purposes, and we are of the same opinion with regard to the \$3,000 received as the price of the Ann street property. As to the Palmyra street property, we are satisfied that defendants paid no part of the price recited in the act whereby that property was conveyed to them.

The prayer of the original petition, so far as it need be quoted, reads:

"Petitioner have judgment against \* \* \* the said Mrs. Heinich and said Mrs. Lafon and the said Mrs. Ernst, decreeing them to account to petitioner for the cash, jewelry, furniture, household effects, and rents fraudulently misappropriated by them, amounting in all to the sum of \$4,000, and that petitioner may have judgment against them for one-fifth of the total amount shown by said accounting, in solido, together with legal interest from dates of misappropriation of said funds, property, etc.; and, further, that petitioner may have judgment against them, decreeing him the owner of one-fifth of the real estate above described, and ordering the same to be sold at public auction to

fix the proportion between him and the said co-owners.

"Petitioner further prays for costs and for all general relief."

By supplemental petition, plaintiff makes some allegations concerning details not set forth in the original petition, and which, being made somewhat in the dark, are not, in all respects, in accord with the facts as disclosed by the evidence. The prayer of the supplemental petition is for judgment as prayed for in the original petition.

The Civil Code declares that:

"Art. 1029. Heirs, who have embezzled or concealed effects belonging to a succession, lose the faculty of renouncing; and they shall remain unconditional heirs, notwithstanding their renunciation, and shall have no share in the property thus embezzled or concealed."

As will be seen, however, plaintiff is not here seeking to enforce the last clause of the article thus quoted, and we shall confine our decree within the limits of his prayer. In giving their testimony, defendants (Mrs. Ernst and Mrs. Lafon) made a return, concerning the furniture and jewelry which their mother had owned, saying that some of it had been given to them, and that other portions of it were of little value, and an informal offer was made by their counsel to turn some, or all, of that property over to plaintiff. It was not shown what rents, if any, in which plaintiff was interested were collected by defendants. Of the real estate referred to in the above-quoted prayer, the properties owned by Mrs. Baensch, on Cleveland avenue and Ann streets, respectively, were sold to third persons, not parties to this proceeding, and, though defendants, as we think, appropriated the proceeds, the titles of the purchasers appear to be good. At all events, they cannot be attacked in the absence of the present owners. As to the real estate acquired by defendants, whether separately or together, on Cortez, Banks, and South Clark streets, respectively, whether under our law or jurisprudence it is sub-

ject to what is elsewhere known as a constructive trust in favor of plaintiff, is a question which we do not consider it necessary to inquire into for the purposes of this case, since we think plaintiff's demands may be otherwise satisfied. The conveyance of the Palmyra street property was in fraud of plaintiff's rights as a forced heir of his mother, and his interest in the property will be recognized. C. C. 2444. Defendants having failed to account for \$7,100 belonging to their mother which went into their hands, and should have been found in her succession, are liable, in solido, to plaintiff for one-fifth of that amount, with interest; and they should account more definitely for the furniture, jewelry, and household effects, which were, or should have been, found in the succession.

It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment in favor of Peter Baensch, plaintiff herein, and against Mrs. Gertrude Heinrich, Mrs. Henrietta Lafon, and Mrs. Elizabeth Ernst, defendants herein, in solido, in the sum of \$1,420, with legal interest thereon from November 26, 1912, until paid. It further ordered that plaintiff be decreed the owner of an undivided one-fifth interest in the property which was the subject of a conveyance from their mother to defendants, by act before E. M. Stafford, notary, of date November 19, 1912, and which is described as:

"A certain lot of ground, together with all the buildings and improvements thereon and all the rights, ways, privileges, servitudes, and advantages thereunto belonging or in any wise appertaining, situated in the first district of the city of New Orleans, in square bounded by Palmyra, Gasquet, Rochblave and Tonti streets, designated as lot No. 20, on plan drawn by Arthur De Armas, deputy city surveyor, dated November 29, 1868, and deposited in the office of Abel Dreyfous, as Book 59 of his Book of Plans, according to which, said lot measures, in American measure, twenty-seven feet one inch front on Palmyra street by one hundred and five feet, ten inches and three lines in depth, between parallel lines."

It is further ordered that a partition of said property be effected in such manner and upon such terms as may hereafter be ordered by the district court. It is further ordered that plaintiff be recognized as the owner of an undivided one-fifth interest in the furniture, jewelry, and household effects, found, or which should have been found, in the succession of Mrs. Theresa Baensch, the mother of these litigants, at the time of her death, and as entitled to an inventory and partition of the same, to be more specifically ordered by the district court. It is further ordered that defendants pay all costs of this litigation which have accrued up to this time, and that this case be remanded to the district court, to be further proceeded with according to law and to the views expressed in the foregoing opinion.

(79 South. 540)

No. 21368.

**BRINKMAN et al. v. SUCCESSION OF POSEY et al.**

(June 7, 1915. On the Merits, May 27, 1918.  
Rehearing Denied June 29, 1918.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR — 356 — APPEAL BOND — DEVOLUTIVE APPEAL.**

Where the appellant asked for and obtained an order for a suspensive appeal, and, after the time allowed for perfecting a suspensive appeal had passed, but within the time for a devolutive appeal, filed a bond for the amount fixed by the judge for a suspensive appeal, the appeal will not be dismissed, but will be maintained as a devolutive appeal.

On the Merits.

**2. INFANTS — 39 — MINORS — SALE OF PROPERTY — DEVIATION FROM STATUTORY PROCEDURE.**

Act No. 25 of 1878, p. 47, authorizes the sale of the interest of minors in real property which is held in common with others at private sale for its appraised value; the appraisement to be made and the terms of the sale to be fixed by a family meeting; the proceedings to be homologated by the judge of probates of the parish in which the minor resides; and such is the mandate under which the representative of minors



acts in making a sale under said act. Any deviation from this mandate works an absolute nullity of the sale of the minors' property.

O'Niell, J., dissenting.

*(Additional Syllabus by Editorial Staff.)*

3. APPEAL AND ERROR ~~635~~(3)—TRANSCRIPT—OMISSION OF DOCUMENT—EFFECT.

Where the omission of a copy of a document from the transcript of appeal was not the fault of the appellant, who gave no instructions to the clerk of the civil district court for making up the transcript, the appeal should not be dismissed on account of such omission.

Appeal from Civil District Court, Parish of Orleans; T. O. W. Ellis, Judge.

Petitory action by Ernest M. Brinkman and others against the Succession of Lloyd Posey and others. Judgment for plaintiffs, and defendants appeal. Motion to dismiss appeal overruled, and appeal maintained as a devolutive appeal, and judgment as amended, affirmed.

John Dymond, Jr., and A. Giffen Levy, both of New Orleans, for appellants. Benjamin Ory, of New Orleans, for appellees.

On Motion to Dismiss Appeal.

O'NIELL, J. The plaintiff, appellee, has moved to dismiss this appeal, and prays, in the alternative, that if it be not dismissed, it be decreed to be only a devolutive appeal. The reasons urged for demanding that the appeal be dismissed are twofold: (1) That the defendant prayed for and obtained only a suspensive appeal, and filed the appeal bond for only a suspensive appeal after the ten days allowed for filing a suspensive appeal bond had expired and after a motion to have the appeal dismissed and the judgment executed had been filed in the civil district court; and (2) that the transcript of appeal is incomplete, because it does not contain a copy of the motion filed in the civil district court for the dismissal of the appeal and for the execution of the judgment.

[1] The appeal bond was filed after the

time allowed by law for perfecting a suspensive appeal. The appeal therefore is not suspensive; but the amount of the bond was fixed in the order of appeal, and the bond was filed in time to sustain a devolutive appeal. Under these circumstances the appeal must be maintained as a devolutive appeal. See *Knoll v. Knoll*, 114 La. 703, 38 South. 523, citing *Succession of Keller*, 39 La. Ann. 579, 2 South. 553; *Succession of Bey*, 47 La. Ann. 219, 16 South. 825; *Michener v. Reinach*, 49 La. Ann. 360, 21 South. 552; *Well v. Schwartz*, 51 La. Ann. 1547, 26 South. 475; *Succession of Watt*, 111 La. 937, 36 South. 31.

[3] A certified copy of the document omitted from the transcript is annexed to and made part of the appellee's motion to dismiss this appeal. It does not appear that the omission of a copy of this document from the transcript of appeal was the fault of the appellant, who did not give any instructions to the clerk of the civil district court for making up the transcript. Hence the appeal should not be dismissed on account of this omission. See *Hiller v. Barrow*, recently decided, 80 South. —, citing section 11 of Act No. 45 of Extra Session of 1870 and *Cock-erham v. Bosley*, 52 La. Ann. 67, 26 South. 814, citing *Phillips v. His Creditors*, 37 La. Ann. 701, *Murphy v. Insurance Co.*, 33 La. Ann. 454, *Borde v. Erskine*, 33 La. Ann. 873, and *Succession of Townsend*, 36 La. Ann. 447.

The motion to dismiss the appeal is overruled, and the appeal is maintained as a devolutive appeal.

On the Merits.

SOMMERVILLE, J. Francis H. Brinkman became the owner of two vacant squares of ground in the Third district of the city of New Orleans, known as squares numbered 38 and 39, before his marriage to Mrs. Eliza

<sup>1</sup> 144 La. —.

E. Zimmer. After his marriage, he became the owner of other property, including 40 vacant squares of ground in the same district. The titles to these 42 squares, or parts of squares, are involved in this suit. His grandchildren, the four children of his son, Ernest M. Brinkman, and the two children of his daughter, Mrs. Julia Brinkman Lampton, are the plaintiffs in this petitory action, and they ask to be declared to be the owners of one-half of the squares numbered 38 and 39, and one-fourth of the 40 squares referred to above. These grandchildren, together with two children of Francis H. Brinkman, were the sole heirs of Francis H. Brinkman, Sr.

Defendants, answering, say that they acquired title from Francis C. Brinkman, one of the heirs of Francis H. Brinkman, who in turn acquired title from William Mitchell, who in turn acquired title from these plaintiffs, together with the grandmother and the other two heirs of Francis H. Brinkman, in pursuance of certain partition proceedings, entitled *Mrs. E. E. Gerard v. Heirs of Francis H. Brinkman*, and also in pursuance of partition proceedings in the Succession of Mrs. Julia F. A. Brinkman, Wife of John Lampton. Defendants allege the property to be valued at \$15,000 and they claim title under the partition proceedings referred to, and had under Act No. 25 of 1878, p. 47, which act reads as follows:

"When two or more persons, some or all of whom are minors, hold property in common, and it is the wish of any one of them, or, if a minor represented by his tutor or tutrix, to effect a partition on the advice of a family meeting, duly convened according to law, to represent the minor or minors, said property may be sold at private sale for its appraised value, said appraisement to be made and the terms of said sale to be fixed by the family meeting, and said proceedings to be homologated by the judge of probates of the parish in which the said minor resides."

Plaintiffs attacked the partition proceedings under Act No. 25 on many grounds. The

district judge gave judgment in favor of plaintiffs and against defendants, basing his judgment upon only one of the objections raised by plaintiffs to the sale of their property. He held that the inventory or appraisement and the report of the experts were illegal, and that the proceedings of the family meeting were nullities, and he set the sale aside.

In this court plaintiffs argue that the sale of their interests in the property were absolutely null for the further reason, appearing on the face of the papers, that the several pieces of property were sold for \$300, when the family meeting appraised them at, and ordered them to be sold for, \$400.

Defendants appealed from the judgment rendered against them.

The record shows that Mrs. Brinkman, who had become the wife and widow of E. E. Gerard, instituted judicial proceedings for the partition of the property belonging to her late husband, Francis H. Brinkman. In this partition suit she claimed to be the owner of one-half of all of the property in the name of her deceased husband, including the two vacant squares of ground, numbered 38 and 39, which belonged to Mr. Brinkman prior to their marriage. She appears to have overlooked their eldest son, Francis H. Brinkman, in this proceeding. She caused to be cited her son, Francis C. Brinkman, the minor heirs of her deceased son, E. M. Brinkman, and the minor heirs of her deceased daughter, Mrs. Julia Brinkman Lampton, through their tutors. She alleged the heirs, or groups of heirs, just referred to, was each one owner of one-sixth of the property. The minors, plaintiffs in this suit, were regularly cited through their tutors, and there was judgment rendered November 18, 1897, and signed November 24, 1897, decreeing Mrs. Gerard, the grandmother, to be the owner of one-half of all of the property, Francis C. Brinkman to be the owner of one-sixth, Ione

Lampton, one-twelfth, Wallace Lampton, one-twelfth, E. M. Brinkman, one twenty-fourth, Albert G. Brinkman, one twenty-fourth, George McD. Brinkman, one twenty-fourth, and Irene L. Brinkman, one twenty-fourth. The eldest son, Francis H. Brinkman, was not included in this judgment.

This judgment was not attacked in this proceeding, either directly or indirectly. The judgment regularly and definitely fixed the interest of each heir of Francis H. Brinkman; and plaintiffs are bound thereby. Each group of heirs is the owner of one-sixth of the property involved.

It further appears that Francis H. Brinkman, who was not made a party originally to the above proceeding, came into court and made himself a party thereto, ratified all of the proceedings, and reserved to himself the right to participate in the proceeds of the partition sale of the property.

The partition proceedings above referred to appear to have been abandoned; and no sale of the property was had thereunder.

On October 31, 1898, John D. Townsend, dative tutor of the minors Brinkman, four of the plaintiffs herein, together with the undertutor of said minors, filed a petition in the suit of Mrs. E. E. Gerard v. Francis H. Brinkman (No. 53884), and asked that a family meeting be appointed under Act No. 25 of 1878 for the purpose of selling the interests of the Brinkman minors in and to the estate of their grandfather, Francis H. Brinkman, at private sale. An inventory was taken of the property, and a family meeting was held in the interest of the minors, wherein it was recommended that the property be sold for cash. The 40 squares were appraised by the family meeting at \$200; "the interest of said minors is one-sixth, or the sum of \$33.33 $\frac{1}{3}$  for all, or the sum of \$8.33 $\frac{1}{3}$  to each of them." And the two squares of ground numbered 38 and 39 were appraised at the sum of \$200; "the in-

terest of said minors is one-sixth, amounting to \$33.33 $\frac{1}{3}$  to all of them or the sum of \$8.33 $\frac{1}{3}$  to each of them."

October 31, 1898, John D. Townsend, dative tutor of the minors Lampton, filed a petition in the Succession of Julia F. A. Brinkman (No. 43443) in which he asked that a family meeting be convoked, and that the minors' interests in their grandfather's estate should be sold at private sale. The family meeting appraised the 40 squares at \$200, and declared "the interest of said minors amount to one-sixth thereof, amounting to the sum of \$33.33 $\frac{1}{3}$  for both minors, or the sum of \$16.66 $\frac{2}{3}$  for each," and the two squares numbered 38 and 39 were appraised at the sum of \$100 each; "the interest of said two minors is one-sixth thereof, or \$33.33 $\frac{1}{3}$  to both, or the sum of \$16.66 $\frac{2}{3}$ ."

The proceedings of both meetings were approved and homologated by the judges of the district court in which the proceedings had been instituted, and orders were issued reading:

"The tutor of the minors herein named is directed to sell, in conjunction with other coproprietors, and at private sale, the minors' interest in the property described in said process verbal, and on the terms and conditions recommended by said meeting, and to sign and execute the necessary deeds."

This was the mandate of the court, authorizing the sale of plaintiffs' property in the proceedings under which defendants claim to have acquired title.

[2] The mandate of the court was disregarded and disobeyed. The tutor of the minors, together with two of the three co-owners of the property, undertook to sell to William Mitchell the whole 42 squares hereinbefore referred to "for and in consideration of the price and sum of \$300, which was paid in cash current money, the receipt of which is hereby acknowledged, and acquittance is granted for same." The appraisements made by the family meetings of the 40 lots was \$200, and of the two lots was \$200, making

a total of \$400; and the order of the court was to sell these pieces of property for \$200 in each instance, making \$400 for the 42 lots.

Act No. 25 of 1878 is very clear in providing:

"That minors' property "may be sold at private sale for its appraised value, said appraisement to be made, and the terms of said sale to be fixed by the family meeting, and said proceedings to be homologated by the judge of probates of the parish in which the said minor resides."

The mandate of the court and of the law was violated, and the property was not sold at its appraised value, \$400. It was sold for \$300. The sale of plaintiffs' property was an absolute nullity.

Defendants say that the nullity here referred to was not alleged, argued, or passed upon by the district court. But, as replications are unknown in judicial proceedings in this state, it was competent for plaintiffs to attack an absolutely null and void sale of their property without pleading such nullity, when it was offered in evidence by defendants; and, as the nullity appears on the face of the papers, it was properly presented to this court.

It is ordered, adjudged, and decreed that the judgment appealed from be amended by recognizing Ernest N. Brinkman, Albert G. Brinkman, George W. McD. Brinkman, and Mrs. Irene L. Cox, born Brinkman, as co-owners in indivision with defendants of the property described in the judgment appealed from, in the proportion of one twenty-fourth each for said Brinkmans, or one-sixth for the four, and Wallace S. Lampton and Miss Ione A. Lampton as co-owners in indivision with defendants of the property described in the judgment appealed from in the proportion of one-twelfth each for said Lamptons, or one-sixth for both, and, as thus amended, the judgment is affirmed at the cost of appellees.

O'NIELL, J., dissents.

(79 South. 542)

No. 22884.

OSBORN v. CITY OF SHREVEPORT.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by the Court.)

1. INJUNCTION  $\S$ 114(2)—RIGHT OF ACTION—ENFORCEMENT OF ORDINANCE.

An agreement containing features of a promise of sale, an option to purchase, and a lease, but which is not a sale, of a residence on a residential street within the limits of a municipal corporation, conveys no such property right to the grantee as will entitle him to an injunction restraining the municipal authorities from prosecuting him for carrying on an undertaking business, upon such street, in violation of an ordinance prohibiting the same.

2. MUNICIPAL CORPORATIONS  $\S$ 613—REGULATION OF BUSINESS—PROHIBITING UNDERTAKING ESTABLISHMENT ON RESIDENCE STREET—ORDINANCE.

The authority conferred upon a municipal corporation to prevent and prohibit the location, construction, or maintenance of all buildings and all establishments where any nauseous or unwholesome business may be carried on, and to restrict the same within certain limits, includes the authority to prohibit the establishment and maintenance of an undertaking business on a residential street where such business has not theretofore been conducted.

3. MUNICIPAL CORPORATIONS  $\S$ 620—USE OF PROPERTY—UNDERTAKING ESTABLISHMENT—RESIDENCE DISTRICT.

In the absence of any prohibitive ordinance, an undertaker may be prevented, agreeably to the maxim, "Sic utere tuo ut alienum non lædas," from establishing his business among residences where such business has not theretofore been conducted.

(Additional Syllabus by Editorial Staff.)

4. COURTS  $\S$ 475(1)—JURISDICTION OF CRIMINAL COURT—OUSTER BY ORDER OF CIVIL COURT.

A criminal court actually in the exercise of its constitutional jurisdiction cannot be ousted thereof by an order of a civil court possessing no supervisory control over it.

5. INJUNCTION  $\S$ 105(1)—PROHIBITION OF CRIMINAL PROCEEDINGS.

Before a criminal or a civil court is seized of jurisdiction of a case involving both an offense and a property right, possessor of property right invaded by enforcement of penal ordinance may appeal to tribunal having jurisdiction to prohibit adverse litigant from taking it to criminal court.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Suit for injunction by Roll Osborn against the City of Shreveport. Judgment for plaintiff, and defendant appeals. Judgment reversed, injunction dissolved, and suit dismissed.

Lewell C. Butler, City Atty., of Shreveport, for appellant. Levy & Crane and Alexander & Wilkinson, all of Shreveport, for appellee.

#### Statement of the Case.

MONROE, C. J. An ordinance of the city of Shreveport (No. 27 of 1915) declares it unlawful "to maintain or operate any undertaking shop or parlor, where bodies are embalmed, kept, or prepared for interment, except on the business streets of the city." It then names, or designates by localities, the business streets and sections and declares that all others are residential. The petition herein, filed in September, 1917, alleges that, on August 20th of that year, plaintiff had entered into a contract \* \* \* to purchase the Logan residence on Christian street in the residential section of the city, for \$18,500, of which \$500 were paid in cash, and the contract, made part of the petition, purports to show an agreement whereby he is to pay the balance in 87 monthly installments (86 of them for \$208.33 each) or, say, \$2,500 per annum; to have right of entry upon the premises in December, 1917, and make the first payment on January 1, 1918; to make certain changes therein, at his own expense; to keep the property insured and deliver the policies to the "vendor"; to have the right to a deed upon paying one-half of the purchase price, provided the interest, taxes, and insurance premiums shall have been paid and all other conditions complied with; the vendor, thereafter, to retain a mortgage and lien for the balance; whereby, should the vendee de-

fault in the performance of any of the terms agreed on, or alter the property contrary thereto, the vendor, at his option, may declare the contract forfeited and retain all payments made, "as liquidated damages and as rent," and all improvements placed thereon; default, after execution of deed, to mature all payments; and vendee to take reasonable care of property and bear expense of repairs. It appears to have been the intention to execute the instrument in the form of a notarial act, as its recitals begin, "Be it known that, before me, Sidney N. Cook, a notary public," etc.; but it bears neither notarial signature nor seal, nor date, save the year 1917 nor does it appear to have been witnessed or registered. There is, however, an admission concerning it to which we will refer a little later. The petition further alleges that plaintiff is an undertaker, conducting one of the largest establishments of that kind in Shreveport, on Texas street (within the business area), and that he has made the purchase in question with the intention of removing and permanently establishing that business on the premises so acquired; that, after making known his intention, he received a communication from the commissioner of public safety, advising him that, if he carried it into effect, he would be arrested and prosecuted under the Ordinance No. 27 of 1915; that the ordinance is void, because ultra vires of the city; and should the court hold that the city charter purports to convey such authority, is unconstitutional, in that it is "unreasonable, unjust, discriminatory, partial and in contravention of common right," invades plaintiff's property rights and deprives him of his property without due process of law; and it prays for an injunction, prohibiting the city authorities from arresting and prosecuting petitioner or otherwise enforcing the ordinance, and for judgment decreeing it to be void. A preliminary injunction was issued, after which

the city filed an exception to the jurisdiction of the court *ratione materiae*, on the ground, that the civil remedy of injunction cannot be used to oust the jurisdiction of the criminal court of prosecutions under the ordinance. The exception having been overruled, the city answered, and the case went to trial on the merits and upon certain admissions and oral testimony, to wit: It was admitted that plaintiff purchased the residence on a residential street upon the date and for the purpose alleged; that he was then, and had been for years, conducting his business on a business street; and that he received the notice that, if he established it on the premises alleged to have been acquired by him, he would be prosecuted under the ordinance. It was further admitted that two sanitariums and a hospital, grocery stores, livery stables, laundries, blacksmith shops, garages, restaurants, fruit stands, etc., are already established on residential streets; that hotels, where families reside, and a telephone exchange, in which 60 young women are employed, are established on business streets; and that undertaking establishments are permitted on residential streets in New Orleans, Denver, St. Louis, Cleveland, Dallas, and many other cities in the United States. Seven witnesses were called for the plaintiff and none for defendant. Plaintiff, himself (as one of the witnesses called on his behalf), gave the following, with other, testimony:

On his examination in chief:

"Q. Mr. Osborn, I believe that you testified in this case, when it was first up, did you not? A. Yes, sir. Q. In the opinion of the court in this case, the court quoted from your testimony which I will read to you: 'In embalming shops, are any offensive odors ever emitted, when a body is being embalmed? A. No, sir; not after a body is embalmed. Sometimes we have quite a time getting the smell of the disease off, and when we are getting out the gases and getting the smell of disease off, they are not so sweet. Q. Is there any difference in operating on a live patient and on a dead patient, so far as the odor is concerned? A. I don't know; I guess some of those dead bodies are not very sweet and there is an odor. Q. Would that odor be

obnoxious? A. I don't know; sometimes it makes it offensive to us until we can get them under control, and I would think, if the neighbors were where they could smell it, or very close at the time, that they would not enjoy it. I have lived over undertakers' shops all my life, and I haven't minded it.'

"Q. Now, with reference to that testimony, did you mean to convey the idea to the court that there were odors around the undertaking shop? A. No, sir. Q. I wish you would explain to the court how long it is before you have gotten a dead body under control, after it is brought into the undertaking shop, irrespective of what its condition is? A. Well, it is a great deal owing to the body; some bodies are very much decomposed and, of course, it takes longer than an ordinary body. For instance, we get a float-er; but, oftener, we get to work, it takes five or ten minutes. \* \* \* Q. Now, then, during the year, is it frequent or infrequent to get bodies decomposed in the morgue? A. Very infrequent. Q. How often? A. I have been where I am at seven years, and I have not had except two or three bodies in very bad condition. \* \* \* Q. If the doors and windows were open, the odors would escape from the room? A. Perhaps they would, but we do not let them get out; we kill them. Q. You endeavor to do that? A. Yes, sir. Q. You would not swear you could absolutely prevent the odors from escaping? A. No, sir."

No questions were asked him concerning his contract for the purchase of the residence, and all that we find upon that subject is the admission that he had made the purchase, and the instrument by private signature, evidencing an agreement as above stated.

Of the other witnesses who were examined, two were undertakers or embalmers. One witness gave the following testimony, when examined in chief:

"Q. During the time that you have lived here, have you ever lived near an undertaking establishment? A. Not until I lived at Osborn's. Q. How long have you lived there? A. About four years, I think. Q. You did live next to Roll Osborn's undertaking establishment? A. Yes, sir; for three years."

The inference that we draw is that the witness was a member of either plaintiff's domestic or business establishment, or both. She testifies that she observed no noxious odors. Another witness is a florist, and another an iceman, both of whom have had

(by reason of their businesses, no doubt) frequent occasion to visit plaintiff's establishment. The florist lived for a year, with his family, over an undertaking shop, and suffered no inconvenience from it, though, being asked whether there were no unpleasant odors coming from it, at times, replied, "At times, there were, the same as in any other business." And he further testifies as follows (the question first asked being whether the odors would not be noticeable and objectionable), to wit:

"It depends upon how close you came to it. I have been in undertaking establishments \* \* \* when they would bring in a corpse that had been in the water several days in the summer, when the odor was very objectionable; but how it would affect different people I do not know. \* \* \* The odor, I do not mind, but I do not know what my neighbor would do. Q. I will ask you if you have not, in your experience, heard neighbors complain about such matters as that? A. I don't know that you could call it complaint, but I'll tell you what I have heard. I have heard people say that they would not live next to an undertaker's establishment; but, of course, that is from a sentimental standpoint; but I am taking the proposition that I would not object to it."

The iceman gave the following, with other, testimony:

"Q. Have you had occasion to go into an undertaker's shop when they brought in bodies decomposed? A. I have been to Osborn's probably a hundred times. Q. Have you not, on some occasions, noticed in their building odors that were disagreeable, from these dead bodies? A. I can't say that I have."

At another time he testifies that he had been a butcher (before he became an iceman), and that he had lived next to plaintiff's place for more than three years; that he did not suffer from obnoxious odors emanating from the place, and was not otherwise inconvenienced; that it was just like living anywhere else, to him; and the same as to his family.

A young lady operator in a telephone exchange, where there are 60 ladies employed and next door to which (in the business part of the city) is an undertaker's shop, testifies

that she has not been inconvenienced by it and has heard no complaint from the others.

One of the embalmers gave the following, with other, testimony:

"Q. You think that you can get the odor from a corpse under control in 10 or 15 minutes, no matter how bad? A. Not all of them; there may be some that I could not get under control in 10 or 15 minutes, but the majority I could. Q. Have to be an extremely bad case that you could not get under control in 10 or 15 minutes? A. Yes, sir. \* \* \* Q. You said that, in some cases, you could not get the odor under control in 10 or 15 minutes? A. Perhaps I might, and then again I might not. Q. Might take longer? A. Yes, sir. \* \* \* Q. During the time that you were getting it under control, it would be bad? A. I expect it would."

The testimony of the other embalmer (and undertakers) is slightly more favorable to the view that there is nothing unpleasant in that business.

#### Opinion.

The objection which first suggests itself, to the issuance, by our civil courts, of injunctions prohibiting prosecutions in the criminal courts, is that our written law does not so provide; but, to the contrary, the Constitution itself declares that prosecutions shall be by indictment or information, or (under statute) by affidavit, and it provides for the courts in which they shall be conducted, and confers upon the civil courts no authority to interfere with the exercise of that jurisdiction. In the other states the writ of injunction is a remedy which is afforded by their systems of equity—"systems of jurisprudence, separate, but incomplete, which are administered side by side with the common law, supplementing the latter where it is deficient, in places, overlapping, and there usually prevailing against the common law." 16 Cyc. 1, 2, note 5. The different Constitutions of Louisiana have uniformly, and in specific terms, prohibited the introduction into this state of any system or Code of laws by general reference thereto, and the prohibition has always been understood as leveled at the com-

mon-law and equity systems prevailing in the other states and in England. Hence the sole basis for the exercise by our courts of equity jurisdiction is to be found in the provisions of article 21 of the Civil Code, reading:

"In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

As, however, the same Constitution and laws which confer upon some of our courts jurisdiction in the matter of the prosecution of crimes and offenses confer upon others jurisdiction in the matter of the protection of property rights, and as the line between the two jurisdictions is not defined in cases where crimes or offenses are confused with property rights, it has been held, not that a court exercising civil jurisdiction will assume to prohibit a court vested with criminal jurisdiction from exercising the same, but that, where rights of property are threatened with invasion by prosecutions under unconstitutional or invalid statutes or ordinances, individuals and officers, from whom such threats proceed, may be enjoined from attempting to execute them, and that, in the absence of express law conferring that authority upon the civil courts, they may appeal to "natural law and reason and received usages," including the practice in the courts of equity in this country and England. *Le Blanc v. City*, 138 La. 272, 273, 70 South. 212. Turning then to the usages recognized in the courts of equity in this country, we find that, in an exhaustive opinion, handed down in 1887, the Supreme Court of the United States, in considering an application for habeas corpus, by certain municipal officers, imprisoned for contempt committed in disregarding an injunction issued by a Circuit Court of the United States, prohibiting them from further proceeding in the matter of the impeach-

ment of a police judge, defined the jurisdiction of a court of equity as follows:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property, it has no jurisdiction over the prosecution, the punishment or the pardon of crimes, or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government." *Ex parte Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

The doctrine sustained for a long time by this court is thus stated in *Levy & Co. v. Shreveport*, 27 La. Ann. 620 (being an appeal from a judgment enjoining defendant from prosecuting plaintiff under a city ordinance), to wit:

"Defendants excepted to the action on the ground that the petition disclosed no good cause for the suit and no proper showing is made for the issuance of the injunction. We think this exception should have been sustained. In order to present the question whether the mayor had authority to arrest and fine the defendants for carrying on a private market in contravention of the ordinances of the city of Shreveport, and the question whether said ordinances are legal, the defendants should have appealed from the judgments imposing the penalty in said ordinances prescribed. They cannot test the authority of the mayor to enforce the ordinances of the city of Shreveport prohibiting private markets, \* \* \* in a proceeding of this kind."

That doctrine was affirmed in many cases, some of which are cited in the opinion in *Le Blanc v. City*, supra.

In 1899, in the case of *L'Hote v. City*, 51 La. Ann. 96, 24 South. 608, 44 L. R. A. 90, this court maintained the right of the plaintiff to an injunction restraining the enforcement of a certain penal ordinance converting into a "red light" district a section of the city of New Orleans in which he owned and occupied a residence; the penalties of the ordinance having been leveled at others than himself, and he having no opportunity, actual or prospective, to test its validity upon the



trial of any prosecution. The language used by the court in dealing with the question of jurisdiction was as follows:

"It is clear that the civil district court has no jurisdiction to restrain prosecutions for crime confided by law to the criminal courts. No prevention of such prosecutions is attempted. The plaintiff seeks the injunction for the protection of his rights of property, menaced, as he conceives, by an illegal ordinance. The right of the citizen to that protection is too clear to permit dispute, and, in our view, the petition contains all that is essential to secure relief at our hands, if the allegations in the petition are supported. 1 High on Injunctions, § 68."

The suit was, however, dismissed, on the ground that the ordinance was valid, and that ruling was affirmed by the Supreme Court of the United States (177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899).

A few years later, in *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778, it appeared that plaintiffs were subcontractors, engaged in the erection of gas works, for Mrs. Dobbins, on a tract of land in Los Angeles, upon which, under an existing ordinance, such works could lawfully be erected, and by virtue of a permit from the proper department of the city government, when the city council passed an amendatory ordinance excluding said land from the territory within which the works were permitted and prohibiting the erection of the same thereon, under penalty, after which the city authorities caused petitioners' employes to be arrested and prosecuted for violating the prohibition by continuing their work; wherefore, an injunction was prayed for, restraining the prosecutions, but the bill was dismissed by the Circuit Court, apparently on the ground that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.

On the appeal to the Supreme Court, that august tribunal considered the question of

jurisdiction, to some extent, but, expressing no conclusion concerning it, affirmed the judgment appealed from, on the ground that plaintiffs, being merely subcontractors, presumably, had an action at law against the contractor, and showed no legal interest in the litigation.

In *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, the plaintiff was the lady whose name appeared in the suit brought by *Davis & Farnum Manufacturing Company*, and her suit was founded on the same cause of action, and, like the other, was dismissed on demurrer; but, having been taken to the Supreme Court of the United States (by writ of error to the Supreme Court of California), it was there decided that the enactment of the amendatory ordinance by the city council of Los Angeles was not a competent exercise of the police power, and that, taking the allegations of plaintiff's bill to be true, she had the right to proceed with the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

It is to be inferred that plaintiff herself was not threatened with prosecution, under the amendatory ordinance, and the questions whether she could have found an adequate remedy against such prosecution in the criminal court, and whether, that being the case, she was entitled to an injunction, staying the prosecutions, were not considered in the body of the opinion; all that is said upon that subject being found in the closing paragraph, which reads as follows:

"It is well settled that, where property rights will be destroyed, unlawful interference, by criminal proceedings, under a void law or ordinance, may be reached and controlled by a decree of a court of equity. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207-218, 23 Sup. Ct. 498, 47 L. Ed. 778-780, and cases there cited."

It was accordingly held that the demurrer should have been overruled and the city

put upon its answer, and the case was remanded for further proceedings not in conflict with the opinion.

In *N. O. Baseball & Co. v. City of New Orleans*, 118 La. 228, 42 South. 784, 7 L. R. A. (N. S.) 1014, 118 Am. St. Rep. 368, 10 Ann. Cas. 757, it appeared that plaintiff had purchased for \$10,000, a square of ground within corporate limits, and which was lawfully available for its purposes, with the intention of operating a baseball park, and that the city council thereafter adopted an ordinance declaring the operation of such parks unlawful within a territory including the square so purchased, and prescribing a penalty therefor; whereupon, plaintiff obtained a preliminary injunction from the civil district court prohibiting the enforcement of the ordinance, and defendant applied to this court for a writ of prohibition, alleging that the civil district court was without jurisdiction to issue the writ. It was here held, however, on the authority of the *L'Hote* and *Dobbins* Cases, that, taking the allegations of the petition to be true, the ordinance was personal, arbitrary, and discriminatory, and showed injury to property rights resulting from its enactment, and that a proper case for the issuance of an injunction was disclosed.

In *Le Blanc v. City of New Orleans*, 138 La. 243, 70 South. 212 (supra), plaintiffs (two in number) applied for an injunction against the enforcement of what is known as the "jitney ordinance," attacking it as unconstitutional, unreasonable, discriminatory, etc., and alleging that one of the two was being prosecuted under it, in the recorder's court. To which the city excepted that the court was without jurisdiction and that the petition disclosed no cause of action. The preliminary injunction was, however, issued, and application made to this court for prohibition, which was granted; it being held that the petition disclosed no invasion of a

property right, and hence that it was immaterial whether the ordinance was valid or invalid, or whether an adequate remedy could be found in the courts vested with jurisdiction to enforce it.

In *Patout Bros. v. Mayor, etc., of New Iberia*, 138 La. 697, 70 South. 616, this court maintained an injunction against the threatened enforcement of an ordinance making it unlawful for any one to "begin, erect, maintain," etc., a livery stable in the residential part of the city, without first obtaining the consent of a majority of the persons owning property within 300 feet of the site or proposed site of such stable and a permit from the city trustees; the facts being that plaintiffs were operating their stable and proposed to enlarge it, when they were threatened with prosecution under the ordinance, whereupon they brought suit alleging that the ordinance was void, because, at the time of its adoption, the city was without authority to regulate stables or fix the limits within which they might be conducted. It does not clearly appear from the opinion whether plaintiffs were in business prior to the adoption of the ordinance or not; but, from the statement that the ordinance had been in existence long before they sought to enlarge the stable, we infer that, in its original shape, it pre-existed the ordinance. However that may be, it was held that the ordinance was unauthorized; that plaintiffs had a property right in which they were entitled to protection; and that the injunction was the proper remedy.

[4, 5] We find nothing in the cited cases which authorizes the conclusion that a criminal court, actually in the exercise of its constitutional jurisdiction, can be ousted of that jurisdiction by the order of a civil court possessing no supervisory control over the other. The most that can be said is that, before either court is seised of jurisdiction, quoad a particular case, involving both an

offense and a right of property, the question of the jurisdiction is an open one; and that, where a municipal ordinance, carrying a penalty is adopted, is believed to be unauthorized and illegal, and its enforcement will destroy or invade a property right, it is open to the possessor of the right to appeal to the tribunal vested with jurisdiction of such matters for protection, and, pending the disposition of the question so presented, that tribunal may protect its jurisdiction by prohibiting the adverse litigant from carrying the same question into the criminal court. We do not find that the right to conduct a particular business in a particular place, whether in violation of a municipal ordinance, or to the prejudice of the rights of others, is a property right within the meaning of those cases.

[1] Applying the conclusions thus reached to the case at bar, we are of opinion that plaintiff has failed to show such a right of property as to entitle him to the injunction that he has obtained. It is true that he alleges, and that it is admitted, that he purchased the residence described in the petition; but he makes part of his petition the instrument relied on as evidencing his purchase, and the one thing which it makes perfectly clear is that it was not intended to operate as a sale, though it may be construed as a promise of sale, an option, or, perhaps, a lease, since it declares that, in the event of plaintiff's compliance with certain conditions, the other party will execute a deed, and of his noncompliance with those conditions, the payments made by him may be regarded as rent, and one who claims title under a written instrument should require no deed, nor can he as owner be indebted to himself for rent. The fact that the instrument was not recorded is further evidence of its intention, since, as the matter stands, the alleged vendor can, at any time, and the alleged vendee cannot, sell or mortgage the property to a third person.

In the cases to which we have referred, the property rights which were sought to be protected were acquired before the enactment of the ordinances by which they were invaded, and the ordinances were in the nature of *ex post facto* enactments which made it an offense to do with property that which did not constitute an offense when it was acquired; whereas, in the instant case, the agreement upon which plaintiff relies was entered into by him, say, two years after the enactment of the ordinance, and, as we think, with a view to its possible or probable enforcement as a valid enactment, which, whatever may be said in regard to the rights of the owner of the property, hardly presents a case for equitable consideration on behalf of the plaintiff.

[2] If, however, that view of the matter should be erroneous, we are still of opinion that plaintiff would not be entitled to the injunction, for the reason that we are not convinced that the enactment of the ordinance was beyond the police power of the city of Shreveport. The case appears to have been presented to the district court as though the plaintiff and the city were the only parties in interest and theirs the only property rights to be considered, and none of the residents, in the midst of whom it is proposed to establish plaintiff's mortuary business, were given a hearing, nor were any witnesses summoned in their behalf to testify either as to the probable effect of the intrusion upon the value of their property or upon their future enjoyment of life in their homes. We have been at some pains, however, to consider carefully the testimony of the witnesses called by plaintiff, and we learn from some of them that a swollen corpse, salvaged from the river, in midsummer, emits an unpleasant odor, but that they, being accustomed to handling such objects, do not mind it; from others, that they have lived in the neighborhood of undertaking establishments and have found them

not different from other places of residence, occasional odors from decayed corpses to the contrary notwithstanding: and from still others, that, living in such proximity, they have observed no odors and suffered no inconvenience. Where, however, in cases involving the suppression of nuisances, witnesses testify that a stench is emitted from a particular establishment, no one thinks it necessary to prove that it is unpleasant or nauseating to the vast majority of those whom it reaches, and who, not being employed in the establishment, have not become inured to it. The courts, we think, may safely take it for granted that, with rare exceptions, civilized human beings are in a greater or less degree made uncomfortable by foul odors, and by none more so than by those emitted from a badly decomposed human body.

It may be that bad cases are infrequent in plaintiff's establishment, and that the stench emitted by them is "brought under control" as rapidly as possible; but a single experience of air so laden would, as we imagine, more than satisfy the average individual for the period of his natural life, and 15 minutes would be quite long enough for the experience.

We find no reason to doubt that plaintiff conducts his business after the most approved methods and with as little offense to those by whom he may be surrounded as the business will admit; but, to the incidents mentioned, there is to be added the fact that the business itself is a gruesome one, and that the psychological influence of being confronted, and having one's family confronted, day after day and at all hours of the day, with death, and its woeful tracings in the shape of hearses and other vehicles, carrying in and out of a neighboring building the mortal remains of some fellow being, is no more enlivening nor wholesome than would be the constant presence of the

same corpse, or the immediate proximity of a grave yard; and we take judicial notice that the introduction of such a business into a residential neighborhood, where none has previously been established, will inevitably depreciate the value of the property as well as discommode the owners. The case is therefore one in which the maxim, "*Sic utere tuo*," etc., is particularly applicable, and if the city of Shreveport had no power to enforce that maxim and protect its citizens in the peace and quiet of their homes, they would be entitled to much sympathy. But we find that act 220 of 1912 (amending the charter of that city), § 1, par. 21, after conferring on the council the power to "prohibit and prevent" various specified businesses, concludes with the following language:

"All establishments where any nauseous or unwholesome business may be carried on shall be restricted to certain limits within the city, to be determined by the city council."

And we think the business here in question is subject to the authority thus conferred.

[3] But, even if that were not the case, and there were no ordinance upon the subject, we can, at present, see no sufficient reason why the residents of the threatened district should not be protected from plaintiff's proposed invasion, under the general provisions of law which safeguards the citizen, in his home life, not only against nuisances per se, but against occupations which become nuisances by reason of the inappropriateness of the places in which they are conducted. The view thus suggested is ably expressed by the Supreme Court of Michigan in an opinion, the official report of which is not at hand, but which counsel for defendant has printed in full, as his brief, and which is said to have been handed down in a case entitled *Saler v. Joy*, 164 N. W. 507, L. R. A. 1918A, 825, on September 27, 1917.

The learned court states that the industry of counsel and its own investigations had

disclosed but two cases directly in point—the one, *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, and the other, *Densmore v. Evergreen Camp W. O. W.*, 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206—and that, in the case first mentioned, it appeared that defendant had been carrying on his business in its then location. In what was said to be a “populous part of the city,” that a portion of the complainant’s house was occupied for business purposes, that the case turned largely upon the question whether the undertaking business was a nuisance per se, and that complainant appeared to be of a supersensitive temperament; and the injunction was denied.

In the case last mentioned, the injunction was granted, on the ground that the business might become a nuisance by reason of its location (in a residential neighborhood) and surrounding circumstances.

Other cases mentioned are *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654, in which it was said:

“But, on the other hand, it” (the law) “does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, ‘sic utere tuo ut alienum non lædas,’ expresses the well-established doctrine of the law.”

And *Barth v. Psychopathic Hospital Ass’n* (Mich.) 163 N. W. 62, in which the erection and maintenance of a private insane asylum in a strictly residential district was prohibited, and it was said, *inter alia*:

“It must be conceded that the establishment of such an institution in close proximity to the residences of the plaintiffs, which are in a residential section of the city, would destroy the comfort, the well-being, and the property rights of the plaintiffs.”

In the case before it, after finding that the danger, alleged by plaintiff, of diseases being communicated from the dead bodies taken to the premises of defendant, was neg-

ligible, the learned court of Michigan went on to say:

“We are not so well satisfied that noxious odors will not escape defendant’s premises. Formaldehyde is extensively used by them in embalming, deodorizing, and sanitation. The more complete the sanitation the more formaldehyde is used. It gives off a pungent odor, and it is quite doubtful to our minds that the odor would fail to reach adjacent houses situated as close as these houses especially in the summer time, when plaintiffs would expect to have, as they have a right to have, their windows open.”

The court was not convinced that undertaking establishments, with morgues attached, were located in other cities in strictly residential districts, and expressed its views on the psychological aspect of the case as follows:

“We think it requires no deep research in psychology to reach the conclusion that a constant reminder of death has a depressing influence upon the normal person. Cheerful surroundings are conducive to recovery for one suffering from disease, and cheerful surroundings are conducive to the maintenance of vigorous health in the normal person. Mental depression, horror, and dread, lower the vitality, rendering one more susceptible to disease, and reduce the power of resistance. There is an abundance of testimony in the record confirmatory of this, and it is a matter of common knowledge.”

And reference is made to funerals, funeral mourners, the taking in and out of the dead, the funeral music, the unknown dead lying in the morgue, the visitors seeking to identify them, and various other reminders of mortality incidental to an undertaker’s establishment and likely to produce a depressing effect.

“We cannot overlook the right to engage in a lawful trade” (said the court), “nor the fact that the undertaking business is not only lawful but highly necessary, nor that it is not a nuisance per se. Nor can we overlook the right of the citizen to be protected in his home, and his right to the enjoyment thereof of that repose and comfort which are inherently his. The question here is, not the restraining of defendant’s business, but the restraint of its introduction into a long-established and strictly residential district.”

The conclusion reached was that the case appealed to the conscience and discretion of the court and called for injunctive relief.

In the case that we are now considering, the positions of the litigants being reversed, and the injunction issued by the district court operating to permit the establishment of the undertaking business upon a residential street, for the reasons thus assigned, it is ordered and decreed that the judgment appealed from be annulled, the injunction herein issued dissolved, the ordinance in question sustained as a valid enactment, plaintiff's demands rejected, and this suit dismissed at his cost.

(79 South. 549)

No. 22602.

**PHILPS v. GUY DRILLING CO.**

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

**1. MASTER AND SERVANT ⇨348—WORKMEN'S COMPENSATION—LIMITING REMEDY—"PRESCRIBE."**

Act No. 20 of 1914, prescribing the liability of employers for compensation to employés, plainly expressed the intention to limit the rights and remedies of employés and their dependents to the compensation thereby provided, and to exclude other rights; to "prescribe" meaning to lay down authoritatively as a guide or rule of action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prescribe.]

**2. MASTER AND SERVANT ⇨351—EMPLOYERS' LIABILITY ACT—APPLICATION—NOTICE.**

Under Act No. 20 of 1914, § 3, subds. 1-3, where there was no written agreement or notice between employer and employé that the act should not apply to the employment, an accident occurring within 30 days after the contract of employment is not excluded.

**3. MASTER AND SERVANT ⇨351—EMPLOYERS' LIABILITY ACT—RIGHT OF EMPLOYÉ—EXCLUSIVENESS.**

Action by mother of deceased employé for compensation for his death from injury within 30 days after contract of employment was within Act No. 20 of 1914, § 34, so that a judgment refusing a demand for damages for tort under Civ. Code, art. 2315, was proper.

**4. MASTER AND SERVANT ⇨401—EMPLOYERS' LIABILITY ACT—LIMITATIONS.**

Where supplemental petition in suit for compensation under Act No. 20 of 1914 com-

plied with section 18, par. 1, a plea of prescription because original petition set forth no cause of action, and supplemental petition was not filed within a year after accident, was without merit.

**5. MASTER AND SERVANT ⇨398—EMPLOYERS' LIABILITY ACT—ACTION FOR COMPENSATION—WAIVER.**

A demand for compensation under Act No. 20 of 1914 was not waived and would not be dismissed merely because urged in the alternative, and only if the court should hold that plaintiff was not entitled to damages for tort under Civ. Code, art. 2315.

**6. MASTER AND SERVANT ⇨408—ACTION ON EMPLOYERS' LIABILITY ACT—ACTION FOR COMPENSATION—DAMAGES.**

In action for compensation under Act No. 20 of 1914, where evidence as to wages and contribution to plaintiff's support were so uncertain that compensation could not be determined, district court, in view of section 18, subsec. 4, should have reopened the case to allow plaintiff to introduce additional evidence.

Monroe, C. J., and Leche, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Action by Mrs. Margaret J. Philips against the Guy Drilling Company for damages for tort, or in the alternative for compensation, under the Employers' Liability Act, for the death of her son. Exceptions of no cause of action filed against original and supplemental petition overruled, demand for damages rejected, and judgment of nonsuit on the alternative demand for compensation, and plaintiff appeals. Judgment rejecting the demand for damages affirmed, and judgment of nonsuit reversed, and case remanded for the admission of evidence on the question of compensation.

Levy & Crane, of Shreveport, for appellant. J. S. Atkinson, of Shreveport, for appellee.

O'NIELL, J. This is an action for damages under article 2315 of the Civil Code, and, in the alternative, a demand for compensation, under the Employers' Liability Act, for the death of the plaintiff's son.

The suit for damages is based upon alle-

gations of negligence on the part of the defendant, employer, and upon the plea that the Employers' Liability Act (Act No. 20 of 1914) is unconstitutional in so far as it purports to deprive an employé, or his dependents, of any other right or remedy than the statute affords. It is contended that that object or purpose of the law is not expressed in its title, as required by article 31 of the Constitution.

The defendant filed a plea or exception of no cause or right of action; the argument being that the only right of action at law was for compensation under the Act No. 20 of 1914, and that the petition did not disclose a cause of action under the statute because the plaintiff did not allege that a dispute had arisen between her and the defendant as to the compensation claimed. The court overruled the exception of no cause of action, maintaining that only a plea of prematurity would have been appropriate to the demand for compensation. Thereafter, and more than a year after the fatal accident, the plaintiff filed a supplemental petition, alleging that the dispute had arisen between her and the defendant before she filed her suit. The defendant again filed an exception of no cause or right of action, and, in the alternative, pleaded that a demand for compensation under the Employers' Liability Act should not be joined with a suit for damages under the Civil Code, even in the alternative, because the defendant desired and was entitled to a trial by jury of the suit for damages; whereas, the proceeding under the Employers' Liability Act had to be tried by the judge alone. The latter exceptions were overruled, and the defendant then answered both the original and supplemental petition.

The main defense to the action for damages under article 2315 of the Civil Code is the contention that the provisions of the Employers' Liability Act, limiting the plain-

tiff's right or remedy to the demand for compensation according to the amount that her son had contributed to her support, is valid legislation and deprives her of a right of action for damages. To the demand for compensation, the defendant pleaded the prescription of one year, and pleaded also that the demand for damages was a renunciation of the claim for compensation.

On the question of constitutionality of the Employers' Liability Act, the district judge held that it was valid legislation, and he therefore rejected the demand for damages. A judgment of nonsuit was rendered on the alternative demand for compensation, because the plaintiff failed to prove, to the satisfaction of the judge, the amount that her son had contributed to her support.

The plaintiff prosecutes this appeal; and the defendant, answering the appeal, prays that the judgment of nonsuit on the demand for compensation be amended so as to reject the demand finally.

After the appeal was taken, the plaintiff, appellant, filed a motion to have the case remanded to the district court to allow her to prove that the fatal accident occurred within 30 days after the date of the contract of employment. She avers, in her motion, that, although there is evidence in the record that the accident occurred within the 30 days, she did not urge the point that the Employers' Liability Act did not, for that reason, apply to her case, because she was not aware of the importance of the proposition until the decision was rendered by this court in the case of *Woodruff v. Producers' Oil Co.*, 142 La. 368, 76 South. 803, on rehearing, after her appeal was taken.

#### Opinion.

[1] The decision of the question of constitutionality of the Act No. 20 of 1914 is sustained by the ruling of this court in *Whittington v. Louisiana Sawmill Co.*, 142 La.

322, 76 South. 754. The decision in that case was that the title of the Act No. 20 of 1914, "An act prescribing the liability of an employer to make compensation for injuries received by an employé, \* \* \* establishing a schedule of compensation, regulating procedure for the determination of liability and compensation thereunder, and providing for \* \* \* payments of compensation thereunder," expressed, plainly enough, the object or purpose of limiting the rights and remedies of an injured employé, and the rights and remedies of the dependents or representatives of a deceased employé, to the schedule of compensation established, and to the liability of the employer, as prescribed by the statute. To "prescribe," in that sense, means to lay down authoritatively as a guide or rule of action. Hence it goes without saying that an act prescribing the liability of an employer to make compensation for injuries received by an employé is an act limiting the rights and remedies of an employé, or his representatives, for injuries received by him. The following expressions in the title of this statute, "establishing a schedule of compensation," "regulating procedure for the determination of liability and compensation, and providing for payments of compensation," indicate plainly the object or purpose of establishing the rights and remedies of the one to whom compensation may be due, and of thereby excluding all other rights or remedies.

[2] We take up next the question whether, if the accident occurred within 30 days after the date of the contract of employment, the plaintiff's case is, for that reason, excluded from the provisions of the Act No. 20 of 1914. That depends upon the correctness of the ruling in *Woodruff v. Producers' Oil Co.*, 142 La. 368, 76 South. 803, where it was held that, under the first paragraph of section 3, the Act No. 20 of 1914 did not exclude an

action for damages against an employer for personal injuries suffered by an employé within 30 days after the date of the contract of employment, unless there was an express agreement to come within the provisions of the act.

After careful reconsideration of the matter, we have concluded that the ruling in the *Woodruff Case* is founded upon an erroneous premise. The error was made in assuming that there was a conflict of terms, that had to be reconciled by judicial construction, between the subsections 1 and 3 of section 3 of the act, and that the two subsections could not be reconciled otherwise than by construing subsection 3 so as to exclude from the provisions of the statute an action for damages for an injury that happened within 30 days after the date of the contract of employment.

We find now, by comparison of the two paragraphs or subsections, giving every word its plain and only meaning, that there is no inconsistency between them.

Subsection 1 is not a complete provision of the law, but refers to and depends upon what follows for its effect. That subsection declares that the act shall not apply to any employer or employé unless, prior to the injury, they shall have so elected by agreement, either express or implied, as thereafter provided; that is, as provided in the subsequent provisions of section 3. And the first subsection further declares that such an agreement—whether express or implied, as we take it—shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation, or determination thereof, than is provided in the act, and shall bind the employé himself, his widow and relations and dependents, as thereafter defined in the act, as well as the employer, etc.

It must be observed therefore that an agreement or election that the statute shall apply to a contract of employment need not



be expressed, but may be implied, and that, as far as subsection 1 goes, the agreement, whether expressed or implied, need not be in existence 30 days, but must be merely "prior to the injury," to have the effect of making the statute applicable to the case.

Subsection 2 of section 3 refers only to contracts of employment that were in operation "or made or implied" before the statute went into effect; and it declares that such contracts shall be presumed to have continued subject to the provisions of the act, unless either party shall have notified the other in writing, not less than 30 days before the accident, of his intention that the provisions of the act should not apply.

As the contract of hiring, in the case before us, was made after the Act No. 20 of 1914 went into effect, we need not consider subsection 2, but must look to subsection 3, of section 3, to determine how and under what circumstances it shall be presumed or implied that the parties to the contract agreed or elected to be governed by the statute. That subsection declares that every contract of hiring, verbal, written, or implied, made subsequent to the time provided for the act to take effect, between an employer and employé engaged in the trades, businesses, or occupations that are specified or may be determined to be hazardous, shall be presumed to have been made subject to the provisions of the act, unless there be, as a part of said contract, an express statement in writing, not less than 30 days prior to the accident, either in the contract itself or by written notice by either party to the other, that the provisions of the act (other than sections 4 and 5) are not intended to apply; and the subsection concludes with a repetition that, unless there be such written agreement or notice, not less than 30 days old, "it shall be presumed that the parties have elected to be subject to the provisions of this act and to be bound thereby."

We find, therefore, not only that subsec-

tion 1 of section 3 harmonizes with, but that it is not complete without, the provisions of subsection 3 of the same section.

The decision in *Woodruff v. Producers' Oil Co.*, being founded upon a wrong premise, must be overruled. Our failure to discover the error sooner is largely attributable to the fact that the question was not considered in the case until it came up on rehearing, and, as a second rehearing was not allowed, the question was not reconsidered. The decision is in conflict with the ruling on the same question in the case of *Effie Boyer v. Crescent Paper Box Factory, Inc.* (No. 22434) 78 South. 596, ante, p. 368. In the latter case, a rehearing was granted, and, on rehearing, the judgment allowing the plaintiff damages under article 2315 of the Civil Code was affirmed because it was held that the Act No. 20 of 1914 (before it was amended by the Act No. 243 of 1916) made no provision for such an injury as the plaintiff had suffered, and therefore did not deprive her of her right or remedy under the Civil Code. The ruling made in the original opinion that *Effie Boyer's Case* was not excluded from the provisions of the *Employers' Liability Act*, merely because the accident happened within the 30 days following the date of her employment, was not reversed on rehearing. On the contrary, it was in effect affirmed, and the decision in the case of *Woodruff v. Producers' Oil Co.* was in effect overruled; because, if the decision in *Woodruff's Case* had remained undisturbed, the *Employers' Liability Act* would have had no application whatever to *Effie Boyer's Case*, and there would have been no occasion then for deciding that the act made no provision for the injury she suffered.

It is argued that, in so far as subsection 3 of section 3 of the statute purports to suspend, for a period of 30 days, the force and effect of an agreement between an employer and employé not to be governed by the Act No. 20 of 1914, the law is unconstitutional

and invalid, because it is an attempt to deprive the individuals of their fundamental right to contract with regard to a matter concerning themselves alone. It is said that, if that provision of the statute is valid legislation, an employer and employé, engaged in a business or occupation that is specified or that might be determined to be hazardous, can never bind themselves by an agreement that a contract of employment, for a period less than 30 days, shall not be governed by the Employers' Liability Act.

[3] There is no occasion here for deciding the interesting constitutional question thus presented, because there was no agreement between the employer and employé, nor written notice given by either party to the other, that the provisions of the Employers' Liability Act were not to apply to their contract of employment. It is said that, if such an agreement had been made, or notice given, it would have had no effect, according to the statute, because the accident happened within the 30 days following the date of employment; hence it is argued that the plaintiff is in no worse position than if an agreement had been made, or notice given, not to be governed by the Employers' Liability Act. That argument, however, assumes, for the purpose of dispensing with the necessity of the agreement or notice, that the provision of the law is valid, and it assumes, for the purpose of exempting the plaintiff from the provisions of the law, that it is not valid. It is either valid or invalid legislation. If valid, the case would be governed by the statute, even if the agreement had been made, or notice given, to the contrary; if invalid, the employé should have given the notice and it would have had effect, notwithstanding the provision of the law to the contrary. We cannot give the plaintiff the benefit of a contract that was not made, or notice that was not given, on the ground that, if the contract had been made or notice had been given, it

would have had effect notwithstanding the statute to the contrary.

Our conclusion is that the plaintiff's case comes within the provisions of the Employers' Liability Act, section 34 of which declares:

"That the rights and remedies herein granted to an employé on account of a personal injury for which he is entitled to compensation under this act shall be exclusive of all other rights and remedies of such employé, his personal representatives, dependents, relations, or otherwise, on account of such injury."

The judgment rejecting the demand for damages under article 2315 of the Civil Code is therefore correct.

As to the alternative demand for compensation under the Employers' Liability Act, we find no merit in the exception of no cause of action. It could be sustained only upon the assumption that the defendant was, or might have been, willing to pay the amount sued for, for all that was said in the original petition. Our opinion is that the petition did state the nature of the dispute and the contention of the petitioner with reference thereto, as required by the first paragraph of section 18 of the Act No. 20 of 1914.

[4] For that reason, also, we find no merit in the plea of prescription based upon the contention that the original petition did not set forth a cause of action, and upon the fact that the supplemental petition was not filed within the year following the date of the accident.

[5] We conclude also that the demand for compensation under the Employers' Liability Act was not waived, and should not be dismissed, merely because it was urged in the alternative and only in the event the court should hold that the plaintiff was not entitled to damages under article 2315 of the Civil Code. The argument that the defendant was entitled to a trial by jury on the primary demand for damages, but not on the alternative demand for compensation, loses its force when we consider that it was the

province of the judge alone to decide, before the trial of either demand on its merits, whether the plaintiff had a right of action for damages under article 2315 of the Civil Code, and that question depended solely upon the question of constitutionality of the Act No. 20 of 1914.

[6] On the merits of the demand for compensation, we agree with the district judge that the evidence is not so certain as to the amount of the average weekly wages the plaintiff's son had earned, nor as to the amount he contributed to her support, as to enable the court to determine what compensation, if any, should be allowed. But we are of the opinion that the district judge should have reopened the case to permit the plaintiff to introduce more evidence on those questions, instead of rendering a judgment of nonsuit. The spirit, if not the letter, of the statute should have prompted a reopening of the case rather than a dismissal of the suit for want of sufficient evidence to enable the judge to determine the rate of compensation to be allowed, when it appeared that some compensation was due. The fourth subsection of section 18 of the Employers' Liability Act declares that, in a suit for compensation under the act, the judge shall not be bound by the usual common-law or statutory rules of evidence, nor by any technical or formal rules of procedure other than as provided in the act, and that he shall decide the merits of the controversy as equitably, summarily, and simply as may be. We have concluded therefore to set aside the judgment of nonsuit on the demand for compensation and remand the case to allow the plaintiff to introduce more evidence as to the amount of the average weekly wages her son was earning and as to the amount he contributed to her support.

The judgment rejecting the demand for damages is affirmed, the judgment of nonsuit of the demand for compensation is annulled,

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and the case is ordered remanded to the district court to admit more evidence as to the amount of the average weekly wages the plaintiff's son earned and the amount he contributed to her support. The appellee is to pay the costs of appeal; the costs of the district court to depend upon the final judgment.

MONROE, C. J., dissents, being of opinion that plaintiff is entitled to recover under Civ. Code, art. 2315.

See dissenting opinion of LECHE, J., 79 South. 552.

(79 South. 554)

No. 21276.

HIBERNIA BANK & TRUST CO. v. LOUISIANA AVE. REALTY CO.,  
Limited, et al.

(May 27, 1918. Rehearing Denied June 29, 1918.)

(Syllabus by Editorial Staff.)

1. FRAUDULENT CONVEYANCES ~~§~~263(1)—ACTION BY CREDITOR—PLEADING CAUSE IN ALTERNATIVE.

A creditor who believes that his debtor has disposed of his property with fraudulent intent, but is without means of knowing whether the debtor has done so for a real consideration with a purchaser's commissions or has merely executed a paper title as a sham, may attack such transaction in a single action by pleading his cause in the alternative.

2. FRAUDULENT CONVEYANCES ~~§~~208—CREDITOR'S CAUSE OF ACTION—STATUTE.

Under Civ. Code, arts. 1971, 1987, 1993, a debtor's alleged frauds committed prior to the indebtedness upon which the creditor declares gave the creditor no right of action.

3. FRAUDULENT CONVEYANCES ~~§~~248—CREDITOR'S ACTION—LIMITATIONS.

Under Civ. Code, arts. 1971, 1987, 1993, a creditor's suit based on his debtor's frauds not begun until more than a year after such alleged frauds is prescribed.

4. FRAUDULENT CONVEYANCES ~~§~~226—"SIMULATED CONTRACT"—EFFECT.

A "simulated contract" is one which, though clothed in concrete form, has no existence in fact, and it may at any time and at the demand

of any person in interest be declared a sham and may be ignored by creditors of the apparent vendor.

**5. PLEADING  $\Rightarrow$  21—CREDITOR'S ACTION—ALTERNATIVE RELIEF.**

Where a creditor charges that a debtor entered into fraudulent real or fraudulent sham contracts, it knows not which, and prays that they be declared void, the creditor is not debarred, on the ground of inconsistency from demanding that the contracts, if sham, be decreed void.

**6. PLEADING  $\Rightarrow$  369(1)—INCONSISTENT ALLEGATIONS—REMEDY.**

Even if a creditor's allegations in an action against an alleged fraudulent debtor are inconsistent, the defendant's recourse is by compelling plaintiff to elect and to dismiss his whole demand only in case of failure to elect.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by the Hibernia Bank & Trust Company against the Louisiana Avenue Realty Company, Limited, and others to have certain sales, assignments, and transfers decreed void because made in fraud of creditors, or, in the alternative, as being fraudulent, simulated, and of no effect. Exceptions of no right of action and of prescription maintained, and suit dismissed, and plaintiff appeals. Judgment reversed, and cause remanded for further proceedings.

McCloskey & Benedict and Carroll & Carroll, all of New Orleans, for appellant. Foster, Milling, Saal & Milling and Hall, Monroe & Lemann, all of New Orleans, for appellees.

LECHE, J. Plaintiff alleges, in substance, that it owns a judgment, which it obtained against J. M. Dresser in the sum of \$60,000, with 7 per cent. interest thereon from September 17, 1911; that, while it believes the said Dresser to be solvent, he has fraudulently and in bad faith, for the purpose of defeating the just claims of his creditors, and particularly of plaintiff, diverted all of his assets of every nature and kind into various alleged companies, and more particularly the Louisiana Avenue Realty Company, of New Orleans; that the Louisiana Avenue Realty

Company is, to the knowledge of all its organizers, stockholders, officers, and directors, a false and fraudulent corporation, and, if not false and fraudulent, simulated and fictitious, composed of no one by the said J. M. Dresser and his immediate family; that it never has had any actual paid-in capital stock, and whilst the great majority of its nominal stock is held by other members of the family of J. M. Dresser, and but little by himself, the said J. M. Dresser directs the policy and controls the action of said corporation absolutely; that the said Louisiana Avenue Realty Company was pretended to have been organized on the 4th of October, 1910, with an alleged capital of \$200,000; that of same Mabel A. Dresser, Maud S. Dresser, Julia H. O'Brien, and John M. Dresser each subscribed for one share of the par value of \$100, and that one Edward L. Szabary subscribed for 1,996 shares; that the alleged assets of the said Louisiana Avenue Realty Company consists of about 43 acres of land in the city of New Orleans, of large value, which are the property of John M. Dresser; that on March 19, 1909, he made a fictitious sale thereof to himself through the interposition of the J. M. Dresser Company, Limited; that the said J. M. Dresser Company, Limited, on November 30, 1910, made a fictitious sale thereof to Edward L. Szabary for a purported consideration of 2,000 shares of the capital stock of the Louisiana Avenue Realty Company and assumptions, and on the same day said Szabary pretended to resell to the said Louisiana Realty Company the same property for the said 2,000 shares of stock on terms; that said subscriptions, purchases, and sales by said Szabary, J. M. Dresser Company, Limited, the Louisiana Avenue Realty Company were as parties interposing, unreal, fictitious, and a sham, as hereinafter averred. And petitioner avers:

"Mr. Szabary was a legal stenographer in the city of New Orleans who simply lent his

name to said Dresser and his associates, when he and they knew that he, said Szabary, was without the means to so subscribe or sell and never intended to do so. That the said alleged stock of the Louisiana Avenue Realty Company is now, or lately was, owned by Mrs. O. A. Dresser, the wife of said John M. Dresser, to an amount of \$119,800, by Miss Mabel A. Dresser, a daughter of John M. Dresser, for \$40,000, by Miss Maud S. Dresser, also a daughter of said John M. Dresser, for \$40,000, and by said John M. Dresser for \$200. That said holdings are fictitious and a sham, and the said real property, the alleged legal title to which is held by the Louisiana Avenue Realty Company, is, notwithstanding all the acts and doings aforesaid, still the property of John M. Dresser. That the said real property is described as follows: \* \* \* That the said Louisiana Avenue Realty Company is therefore nothing but a sham, without legal corporate existence under the laws of this state, and was intended as a mask and cloak to defeat the creditors of the said J. M. Dresser, and particularly your petitioner, all to the knowledge of all the organizers and stockholders of the said Louisiana Avenue Realty Company and persisted in by them for said illegal purpose.

"(8) Now, your petitioner avers that heretofore, to wit, in the proceedings No. 100187 of the docket of this honorable court, division E hereof, it sued the said J. M. Dresser Company, Limited, a copy of which petition is here referred to and made part hereof, and the allegations in which it hereby reiterates; and in connection with said proceeding 100187 your petitioner avers that various contracts alienations assignments have been made by the said J. M. Dresser to the said Avenue Realty Company, or by the said J. M. Dresser Company, Limited, to the said Louisiana Avenue Realty Company, or by Miss Mabel A. Dresser, Miss Maud S. Dresser, Mrs. O. A. Dresser, wife of J. M. Dresser, Julia H. O'Brien, or Edward L. Szabary to the said Louisiana Avenue Realty Company, and all of which alleged assignments, alienations, and contracts by the said parties are false, fraudulent, and void, founded upon no consideration, and resorted to by the said John M. Dresser, Mabel A. Dresser, Maud S. Dresser, Mrs. O. A. Dresser, the Louisiana Avenue Realty Company, and the said J. M. Dresser Company, Limited, all in collusion, to defeat the rights of the creditors of said J. M. Dresser, and particularly this petitioner, his judgment creditor, and in the alternative, if not fraudulent, that the same are simulated, null, and void and of no legal force and effect against your petitioner." "That all the said assets of every nature and kind of the said Louisiana Avenue Realty Company are in law and in fact the property of the said John M. Dresser, and are amenable to seizure and sale, under execution of the judgment so obtained by your petitioner against the said John M. Dresser, and should be so decreed."

Plaintiff then prays for service of citation and for a judgment decreeing the Louisiana

Avenue Realty Company a fraudulent corporation, or, if not fraudulent, simulated and void, and solely a mask or cloak resorted to by the said John M. Dresser and the members of his family to enable the said John M. Dresser to defeat the rights of his creditors, and particularly your petitioner; that the acts of sale of the property hereinbefore described, to wit, John M. Dresser to J. M. Dresser Company, Limited, of March 18, 1909, J. M. Dresser Company, Limited, to E. L. Szabary of November 30, 1910, and E. L. Szabary to Louisiana Avenue Realty Company, Limited, of November 30, 1910, be decreed fraudulent and void, or, if not fraudulent, simulated null and void, and that said property be decreed to be the property of J. M. Dresser, and subject to seizure and sale in execution of the judgment of your petitioner; that any and all other transfers of any property, rights, or credits of the said J. M. Dresser to the said Louisiana Avenue Realty Company, Limited, of Miss Mabel A. Dresser, of Miss Maud S. Dresser, and Mrs. O. A. Dresser to the said Louisiana Realty Company, Limited may be annulled and set aside, and said property rights adjudged amenable to a writ of execution under petitioner's judgment.

To this petition defendants pleaded exceptions of misjoinder of parties, misjoinder of causes of action, then in the alternative a motion to strike out as vague, indefinite, and not properly averred, all the allegations and prayers of plaintiff's petition, in relation to other transactions charged to be fraudulent, and, if not fraudulent, simulated, forming part of another suit in the civil district court and attempted to be ingrafted in the present suit merely by reference to said other suit. Defendant then pleaded the exceptions of no right or cause of action, prescription, and also estoppel.

All of the foregoing exceptions were overruled and the plea of estoppel referred to the merits.

Defendants then answered, and before the case had been fully tried the trial judge reversed his former ruling on the exceptions of no cause of action and no right of action and prescription, maintained said exceptions, and the present appeal was taken by plaintiff from a judgment dismissing its suit.

### Opinion.

Plaintiff's petition, down to and including the seventh paragraph thereof, assumes that the judgment debtor, John M. Dresser, is solvent, and charges that the transfers of property made by him first to the Dresser Company, Limited, then by that company to Szabary, and then by Szabary to the Louisiana Avenue Realty Company, are mere shams and fraudulent simulations, but in the eighth paragraph thereof, which is quoted in full, it alleges, in the alternative, that if said transfers, assignments, etc., are not fraudulent, the same are simulated, null, and void and of no legal force and effect. The prayer of the petition, which more properly characterizes the nature of the action, also asks that the said transfers, assignments, etc., be decreed fraudulent and void, or, if not fraudulent, simulated, null, and void. It thus appears that the action, interpreted by the plaintiff itself in the eighth paragraph of its petition, and in the prayer thereof, is dual in character. Its purpose is to have the sales assignments and transfers decreed void, because: First, if real, they were made in fraud of creditors; and, second, in the alternative, if not real, they were mere fraudulent simulations and of no effect.

[1] The jurisprudence of this state is settled that a creditor who believes that his debtor has disposed of his property with fraudulent intent, but who has not the means to find out with definite certainty whether his debtor has done so for a real consideration with the connivance of an ac-

commodating purchaser, or has merely executed a paper title as a sham, and without any consideration whatever, may attack such a transaction in a single action by pleading his cause in the alternative.

"In the class of cases now under consideration, the widest latitude should be given them [the creditors] for they are necessarily, to a great degree, uninformed as to the precise relations existing between their debtor and his coadjutors in wrongdoing. Often they are compelled to strike in the dark. If the purchaser's title is an honest one it is better for him that the double test be applied, in one, instead of two suits." Chaffe, Jr., v. Scheen, 34 La. Ann. 687.

[2, 3] Considering, then, the exceptions of no right or cause of action and prescription as far as they apply to the first ground of action declared upon by plaintiff, namely, that the transfers, assignments, etc., made by its debtor, John M. Dresser, were real, and, while made for a consideration, are voidable because made in fraud of its (plaintiff's) rights, we find that the articles of the Civil Code are to the effect that such an action may only be maintained against an insolvent debtor; that the suit must be brought within one year of the commission of the fraud; that the fraud must have injured the creditor; and that the creditor's claim must have been in existence prior to the commission of the fraud. C. C. arts. 1971, 1987, 1993; Gugel v. Carson, 133 La. 92, 62 South. 485. But, according to the allegations in its petition, plaintiff's claim, giving it the benefit of the most favorable presumption, only came into existence on September 17, 1911, and the sales attacked are of date March 19, 1909, and November 30, 1910; and, according to the evidence in the record, its judgment against Dresser was obtained February 23, 1912, and this suit was only filed May 26, 1913. It therefore follows that, taking as true plaintiff's allegations that defendant was not insolvent, and that the alleged frauds were committed long prior to the creation of the indebtedness upon which it declares, and more than a year before the

institution of the present suit, the exceptions of no cause of action and prescription were to that extent properly maintained.

[4-8] If we now consider the exceptions in so far as they affect plaintiff's secondly declared ground of action, namely, that the so-called sales and transfers are mere shams and simulations, it is evident that said exceptions are not sustainable under our law. A simulated contract is one which, though clothed in concrete form, has no existence in fact and is only a myth. It may at any time and at the demand of any party in interest be declared a sham, and it may even be ignored by creditors of the apparent vendor. Defendants do not controvert that proposition, but they say that plaintiff, having first alleged a real contract, which it charges to be voidable for fraud, cannot in the next breath, although in the alternative, charge that said contract is not real; in other words, that it is inconsistent to say that a contract is real, and in the alternative to say that it is not real. No authority or precedent is cited in support of defendants' contention, and plaintiff refers us to the case of Ditzell Engineering Co. v. Lehmann, 120 La. 279, 45 South. 138. In that case it was held that a petition which states the facts and draws therefrom alternate legal conclusions is not open to the objection of inconsistency. Conversely in the present case facts which in their very nature are unknown to the plaintiff are alleged in the alternative, but the same legal conclusion is drawn from them. As stated in the case of Chaffe, Jr., v. Scheen, hereinbefore quoted, the reason for permitting these alternative pleas lies in the fact that plaintiff is of necessity in the dark as to the truth. Wrongdoers, if they be such, are always careful to conceal the evidence of their real intentions.

Viewing the question as one of practice, neither regulated by law nor settled by ju-

dicial precedents, and in the decision of which we should be entirely guided by equitable considerations, we see no good reason to hold that plaintiff's alternative ground of action is inconsistent with that alleged primarily. Even if it were inconsistent, and so admitting for the sake of argument, defendant's recourse would be to compel plaintiff to elect, and to dismiss his whole demand only in case of failure to elect. Foxworth, Ex'r, v. Burckhalter, 3 La. Ann. 365. It is true that it would be more logical to charge the greater or more glaring wrong first, and then in the alternative to charge the better concealed or lesser one, but, on the other hand, if the order is reversed, we can conceive of no injury thereby resulting to defendant. It must be borne in mind that plaintiff is groping in the dark; it has no means of knowing the truth; while, on the other hand, defendants know the real facts, and cannot be misled by plaintiff's allegations. To sum up the situation, plaintiff substantially charges that defendants either entered into fraudulent real contracts or fraudulent sham contracts, it knows not which, and it prays that in either event said contracts be declared void; and we hold that, although it affirmatively appears that plaintiff has no right or cause of action to avoid such contracts, if real, it is not thereby, on the ground of inconsistency, debarred from demanding that said contracts, if only shams and simulations, be recognized as void and of no effect.

For these reasons, the judgment appealed from is avoided and reversed, and it is now ordered that this case be remanded to the civil district court, parish of Orleans, there to be proceeded with according to law and the views herein expressed, costs of appeal to be paid by defendants and appellees, action on other costs to await final determination of the suit.

O'NIELL, J., concurs in the decree.

(79 South. 557)

No. 21350.

**INTERSTATE TRUST & BANKING CO. v.  
LOUISIANA AVE. REALTY  
CO., Limited.**

(May 27, 1918. Rehearing Denied June 29,  
1918.)

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by the Interstate Trust & Banking Company against the Louisiana Avenue Realty Company, Limited. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded for further proceedings.

Carroll & Carroll and McCloskey & Benedict, all of New Orleans, for appellant. Foster, Milling, Saal & Milling, of Franklin, and Hall, Monroe & Lemann, of New Orleans, for appellee.

LECHE, J. This case was consolidated for argument with that of *Hibernia Bank & Trust Co. v. Same Defendants* (No. 21276) 79 South. 554,<sup>1</sup> this day decided. Plaintiff's allegations, save as to the date of its debt, the amount and date of its judgment, are similar to the allegations of the petition in the *Hibernia Bank Case*.

Considering that the provisions of the Code upon which we rested our opinion in the other case are, notwithstanding these differences, equally applicable to the issues presented in this case, and for the reasons stated in our opinion in the said *Hibernia Case*, No. 21276.

It is ordered that the judgment herein appealed from be avoided and reversed, and that this cause be remanded to the civil district court for the parish of Orleans, there to be proceeded with in accordance with the views expressed in our opinion this day rendered in the case of *Hibernia Bank & Trust Co. v. The Louisiana Avenue Realty Co., Limited*, defendants to pay costs of appeal, action on other costs to await final determination of this suit.

MONROE, C. J., takes no part.

(79 South. 557)

No. 22408.

**ELMENDORF et al. v. OLARK.**

(Nov. 26, 1917. On Rehearing, June 29, 1918.)

(*Syllabus by the Court.*)

**1. MUNICIPAL CORPORATIONS §=705(11)—VIOLATION OF ORDINANCE—PROXIMATE CAUSE.**

Where the owner of an automobile places in charge of it a chauffeur who does not possess the age qualifications required by a city ordi-

nance, and the chauffeur fails to keep a proper lookout for the safety of children whom he sees playing upon a sidewalk bordering upon the street, and upon the side of the street upon which he is about to drive the machine, and negligently and in violation of the ordinance attempts to pass the children without sounding his horn and at a prohibited rate of speed, with the result that one of the children, getting suddenly in the street, in the course of their play, is knocked down by the machine and fatally injured, such owner will be held liable in damages to the parents, for the injury to and death of the child. There is, in such case, a direct relation of cause and effect between the violations of the prohibitory ordinance and the injury inflicted.

Leche, J., dissenting.

On Rehearing.

(*Additional Syllabus by Editorial Staff.*)

**2. MUNICIPAL CORPORATIONS §=706(5)—INJURY FROM AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

In an action for damages by the parents of a boy, killed by defendant's automobile while his chauffeur was attempting to pass at a prohibited speed, held, on the evidence, that the accident was attributable to the boy's negligence.

**3. MUNICIPAL CORPORATIONS §=705(10)—INJURY FROM AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.**

Negligence, resulting from the violation of an ordinance fixing the age of a chauffeur, affords a cause of action only in the absence of contributory negligence on the part of one struck and killed by the automobile.

**4. MUNICIPAL CORPORATIONS §=705(10)—INJURY FROM AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.**

Negligence, resulting from the violation of an ordinance fixing the age of chauffeur, affords a cause of action only if, after the contributory negligence of the one struck had ceased, there was a last clear chance of avoiding the accident.

Monroe, C. J., and O'Niell, J., dissenting.

Appeal from Sixth Judicial District Court, Parish of Ouachita; Ben C. Dawkins, Judge.

Action by George H. Elmendorf and another against O. O. Clark. Judgment for defendant, and plaintiffs appeal. Judgment affirmed.

R. F. Liebler, of Alexandria, and George Wear, Jr., of Jena, for appellants. Stubbs, Theus, Grisham & Thompson, of Monroe, for appellee.

<sup>1</sup> Ante, p. 962.



## Statement of the Case.

MONROE, C. J. This is an action in damages by the parents of a boy, who lost his life by reason of his being struck by an automobile operated by the minor son of the defendant, and the matter comes to this court upon an appeal by plaintiffs from a judgment rejecting their demand.

The facts, as we find them disclosed by the evidence in the record, are as follows:

The accident occurred on De Slard street, the principal business thoroughfare of the city of Monroe, in the evening of Christmas day, 1915, at about 5:30 or 6 o'clock, and it is admitted that the sun set at 1 minute past 5 on that day. The store windows were lighted at the time of the accident, and probably the street lamps, and it is contended on behalf of defendant that the lights upon his automobile (which was a Hudson 4, and, for convenience, will be called a car) had been turned on, but the evidence is radically conflicting on that point, and we shall pass it without decision. Defendant lived in West Monroe, which lies upon the west side of the Ouachita river, opposite the city, and is connected with Monroe by a bridge which spans the river at the end of De Slard street. He had been out for several hours with his car upon the east side of the city, and at the time of the accident was returning home, going westward, on the north side of De Slard street, which is separated by a street car track, from the south side, and was the proper side for him to use, going in that direction. The acting chauffeur of the car was his son, who had attained the age of 17 years some 3 or 4 months before, and was operating the car from the chauffeur's position, which, on that particular car, was upon the right end of the front seat, the left end having been occupied by defendant's brother-in-law, Mr. Maroney, and the back seat by defendant and three of his friends, to wit, Mr. McLeod to the right, Mr. Whitfield in the middle, and defendant to the left, with Mr.

Henry seated upon his knees. As the car approached the scene of the accident, the horn was sounded at a point about 150 feet distant, and was not sounded afterwards, and Whitfield and Henry testify that, from that distance, they saw a "bunch" of boys on the north sidewalk; Whitfield being unable to say whether they were playing, or merely standing, and Henry saying:

"I was not looking right up the street. I was looking sort of up the sidewalk at those boys. I had my eyes on the boys. They were playing—hunting each other. I was looking at the boys, thinking about how my boys used to be Christmas time—playing on the sidewalk."

McLeod saw them from a distance of 20 steps, and says that they were "tagging" at each other. Defendant, being on the left end of the back seat, with Henry on his knees, did not see the boys. "Jimmie" Clark (the acting chauffeur) saw them from some distance, not stated, "walking down the street," and he says "they started playing," and that he "didn't see them, after that," until just a moment before the accident, when he saw the Elmendorf boy leave the sidewalk, but with his face turned in that direction, and come towards the car, by which he was knocked down and so injured that he died. Maroney "didn't see any children, or any one on the sidewalk, until this little Elmendorf boy left the curb."

The car, we are satisfied, was moving at a rate exceeding 8 miles, and probably as high as 10 miles an hour, and upon a line not less than 6, and probably 8 feet from the curb. The boy was struck by the metal piece which serves as a bumper, upon the thigh of the right leg, breaking the femur, knocking him down, and thereby fracturing his skull. The car, some 12 or 14 feet in length, passed over him, and when it was stopped he was found with his feet under the rear axletree and his body extending back, to the eastward. He was 10½ years of age, and had been sent by his mother to the baker's to get bread for

supper, and, the baker not being ready with his bread, he met several other boys of about the same age, one or two of whom were on the same errand, and they seem to have engaged in what might be called sky-larking with each other, playing "tag," as one of the incidents of which amusement little Elmen-dorf playfully kicked another of the boys, and, naturally expecting a return in kind, or of some kind, backed or sidled away, off the sidewalk and into the street; our conclusion, from the testimony and from the fact that the bumper, or guard, of the car struck him on the right leg, being that his movement was rather a sidelong one, in a southeasterly direction, and that he kept his face turned towards the boy from whom he was retreating, but who was prevented from following by the desire to comply with a request from another member of the party to show him a pair of new boots that he had probably received as a Christmas gift, and which were somewhat obscured by an overcoat. It was perhaps on that account that the movement was not a very rapid one, and it is not surprising, under the circumstances, that there should be some variance in the testimony as to whether it was backward, forward, or sideways. One or two of the boys say that the little chap backed slowly; another, that he ran. Young Clark, the acting chauffeur, says:

"He was coming towards me with his head down, looking back, and he struck the street, about running. \* \* \* He was going at a moderate gait."

It will be understood that the boy and the car were approaching the same point, the one moving in a southeasterly, and the other in a westerly, direction, and that, as we think, when the boy suddenly found that the car was bearing down on him, he made an attempt to escape it by a turn to his left, thus presenting his right side, upon which he received the impact of the car. After that he was taken to a sanitarium, where he lingered,

with intervals of consciousness and suffering, until the following evening, when he died.

The city ordinance in force at that time prohibited the operation of motorcars, in Monroe, without licenses, and prohibited the owners of such cars from permitting any one under 18 years of age, or not licensed as a driver or chauffeur, to use or operate them, and also made it unlawful for any one to operate such a car in that part of the city at a higher rate of speed than 8 miles an hour. It is admitted that young Clark was under 18 years of age, and that he had been operating the car in question, with defendant's consent, for some 2¼ years, and several witnesses testified that they considered him a careful operator.

#### Opinion.

It may be conceded that the mere violation of a city ordinance by one citizen does not afford another a ground of action in damages, unless some direct relation of cause and effect between the violation and the damages can be traced with reasonable certainty; and, if it were shown that the injury here complained of would have been sustained, even though defendant's car had been operated by a lawful chauffeur, at a lawful rate of speed, and that the chauffeur had been guilty of no negligence, defendant would be entitled to judgment in his favor, notwithstanding that, in fact, the car was operated by an unlawful chauffeur, at an unlawful rate of speed. But no such showing has been made. To the contrary, we find warrant in this record, as well as in common reason, for the conclusion that, if an older, more cautious and experienced, chauffeur had been driving the car, and had seen, approaching him, on a sidewalk raised but a few inches above the street, a "bunch" of boys, inspired with Christmas hilarity, he would not have taken his eyes off of them when they began to play "tag," but would have assumed that

their activities might lead them suddenly into the street, and would have regulated the speed and direction of the car, and have sounded his horn, with reference to that probability. Moreover, it seems quite certain that, if the car had been traveling even a shade slower, it would not have reached the point of collision at the moment that the boy reached there, and that there would have been no accident.

Mr. I. E. Pettit, a witness called by plaintiffs, and who may be said to have qualified as an expert in the driving of automobiles, testified as follows, on cross-examination:

"Q. In your experience in driving cars on the streets of Monroe, is it not the most dangerous practice that you know of of children jumping suddenly from the sidewalk? A. Worse than it is in a city 400 times as big as this. Q. Is that not the most dangerous feature in driving in Monroe—the most dangerous feature of traffic? A. Yes, sir."

His re-examination in chief reads in part:

"Q. I understand that you say that Monroe is \* \* \* severely afflicted with people who make a practice of darting off the sidewalks in front of automobiles. If that be true, would not that fact—with a bunch of children, from 4 to 14 years of age, playing on the sidewalk—from your experience, would not that cause the ordinary driver to be unusually watchful? A. The trouble with the drivers—If a man were always driving—ordinary drivers—I don't think it would make any difference. I do, because I am driving 200 times up and down the street, all the time. \* \* \* Q. Is it well known among automobile drivers that children are apt to turn out on the street? A. I don't know about all persons. I know it is. It is well known to me, because I have been driving—not only children, but grown people."

He further testifies that a car driven along the street should carry a headlight and a horn, and that the horn should be sounded at reasonable intervals.

We have it, then, drawn out by defendant's learned counsel, that the most dangerous feature of automobile driving, in Monroe, is the practice of the children of jumping from the sidewalks, and, otherwise from the witness, that it is the duty of a prudent chauffeur to be on the lookout for incidents of that

kind; and yet the chauffeur in this case saw the children, playing on the sidewalk, could have seen, as others in the car saw, that they were playing "tag," a game which requires active scampering around and getting out of each other's reach, and then saw them no more (though there was nothing to obstruct his view) until one of them left the sidewalk, backing, or sidling, in the direction of the car, when he found it impossible to avoid the deplorable tragedy which then resulted.

It is true that he testifies that he had reduced his speed to about 5 miles an hour, and Mr. Whitfield gives similar testimony; but Mr. Maroney says that the speed was 8 or 10, and Mr. McLeod, that it was 10 or 12, miles an hour, and the boys that it was unusually high; on the other hand, the acting chauffeur can give no reason why, taking people to their homes at that hour in the evening, he should have traveled at so slow a pace as 5 miles an hour, and admits that he was not thinking of the boys, and that, his speedometer being out of order, he merely guessed at the figure given by him. We are therefore of opinion that the guesses of the others are likely to have been more accurate, particularly Mr. Maroney's, since he is shown to have been in the livery business for a long time, and is not unlikely to have acquired proficiency in the art of guessing the speed of vehicles. If, however, it could be conceded that the car was moving at the rate of only 5 miles an hour, it should have been stopped, according to the testimony of the experts in that line, either instantly or within a foot and a half, instead of which it ran not less than 14 feet from the time it struck the boy, whom the acting chauffeur had seen when he left the sidewalk and moved in the direction of the car, with his face turned in the other direction.

The ordinance prohibiting the operation of

cars by persons under 18 years of age is predicated upon the theory that caution and experience are the characteristics of age rather than of youth, and upon the well-founded belief that there are few occupations in which these characteristics are so essential to the public safety as the driving of motorcars through the streets of cities and towns. Those machines, when so used, are, at best, much more dangerous to the children and grown people who jump from the sidewalks than the children and grown people are to them; and it is the duty of the courts to make it plain that, in the hands of incautious and inexperienced chauffeurs, they are a constant menace to human life, and that it is not their owners or operators who have most reason to complain of the danger which surround their operation, but those who, or whose loved ones, are injured and killed by them.

[1] We conclude that the proximate cause of the accident, in this case, was the failure of the acting chauffeur, allowed by defendant to operate his car (though lacking the age qualifications required by the city ordinance for such function), to keep a proper lookout for the safety of the children whom he saw playing upon the sidewalk of the street over which he was about to drive the car, together with his negligence and violation of the ordinance in attempting to pass the children, so situated and occupied, without sounding his horn and at a prohibited rate of speed, and that there was a direct relation of cause and effect between the violations of the ordinance and the injury inflicted. *Crisman v. Shreveport Belt R. Co.*, 110 La. 640, 34 South. 718, 62 L. R. A. 747; *Navailles v. Dielmann*, 124 La. 421, 50 South. 449, 134 Am. St. Rep. 508; *Burvant v. Wolfe*, 126 La. 787, 52 South. 1025, 29 L. R. A. (N. S.) 677; *Shields v. Fairchild*, 130 La. 648, 58 South. 497; *Walker v. Rodriguez*, 139 La. 251, 71 South. 534; *Albert v.*

*Munch*, 141 La. 686, 75 South. 513, L. R. A. 1918A, 240.

Plaintiffs sued for \$10,000, plus certain expenses, with interest from date of judgment, but (no doubt in view of the jurisprudence of this court in similar cases) now pray, through the brief of counsel, for a judgment for \$6,000, which amount will be awarded.

It is therefore ordered that the judgment appealed from be set aside, and that there now be judgment in favor of the plaintiffs, each for one-half, and against the defendant, in the sum of \$6,000, with legal interest thereon from the date upon which the judgment shall become final, and all costs.

LECHE, J., dissents.

On Rehearing.

PROVOSTY, J. [2-4] Upon reconsideration of this case, we have concluded that the accident resulting in the death of plaintiff's child was attributable more to the negligence of the boy than to that of the defendant, if not entirely to the negligence of the boy in running out into the street from the sidewalk in the middle of a block right in front of the automobile. In fact, the only negligence which is positively proved against the plaintiff is in the fact that his son, who was running the automobile, was 17 years and 3 months old, instead of 18 years old, as required by the city ordinance. The traffic policeman at the corner saw nothing wrong with the car as it passed the corner 150 or 200 feet before reaching the place of the accident, and the occupants of the car testify it was moving slowly; and it would hardly have put on speed after passing the policeman, for it was to stop at the next corner to let off one of the passengers. The point of whether the lights were on is unimportant, as there was yet sufficient daylight for the lighting of the auto's lights not to have been as yet necessary. The testimony leaves

doubtful whether the lights were on or not. But we are satisfied that if they had not been on, and it had been dark enough for their not being on to be a noticeable fact, the policeman at the street corner, whose business it was to notice such things, would have noticed it. The boys, according to their own evidence, were standing on the sidewalk when the plaintiff's boy joined them and at once kicked, or tagged, the Hammond boy, and then, in order to avoid the return kick or tag, which he had to expect, left the sidewalk and went into the street. He moved slowly, the Kelly boy says; but the other two boys say he ran, and one of them says it all happened just like a flash, and the probability is that the boy did run, and that, too, in the direction of the automobile, and that it did happen all in an instant. The automobile is not shown to have been closer to the curb than it should have been. So far as blowing the horn is concerned, the horns of automobiles are not required to be blown midway of blocks, nor because boys or other children are seen on the sidewalk; and after the boy had left the sidewalk, and was running towards the automobile, there was no time to be blowing horns—none sufficient, in fact, even for putting on brakes. That the young chauffeur was experienced and strong, and that he did all that an older man could have done to avoid the accident after the danger had manifested itself, the evidence leaves no doubt. The experts admit that, when it comes to stopping an automobile within a given number of feet, it makes quite a difference whether the stop is being made by way of testing the possibilities in that regard, or is being made in an unexpected emergency. The negligence resulting from the violation of the ordinance fixing the age of chauffeurs could serve as a ground of action only in the absence of contributory negligence on the part of the boy, or only if, after this contributory negligence had ceased, there had

been a last clear chance of avoiding the accident, and under the circumstances there was no such chance. The foregoing was the appreciation of the facts by the learned trial judge; the case having been tried without a jury.

Judgment affirmed.

MONROE, C. J., and O'NIELL, J., dissent.

(79 South. 768)

No. 20757.

HARANG et al. v. GOLDEN RANCH LAND & DRAINAGE CO.

(Jan. 28, 1918. On Rehearing, June 29, 1918.)

(Syllabus by the Court.)

1. PRESCRIPTION—LIBERANDI CAUSA—POSSESSION—ASSERTION OF OWNERSHIP.

From the moment that the rights of the owner not in possession of immovable property are challenged or invaded by one who sets up an adverse claim of title or possession, the relation of debtor and creditor, within the meaning of the law declaring the prescription liberandi causa is established, and, if the pretensions of the debtor are of a character to authorize or require an action at law, on the part of the owner, who becomes the creditor, for the vindication of such rights, the period at the end of which that prescription becomes effective begins, and, if the creditor remains silent until its completion, he loses, not only his right to complain that the title asserted by the debtor is defective, or no title, or his possession not such as to enable him to hold the property as owner, but the right to bring any action at all, since the prescription operates as a peremptory and perpetual bar to every species of action, real or personal, that he might otherwise have brought in the premises.

O'Niell and Provosty, JJ., dissenting.

On Rehearing.

(Additional Syllabus by Editorial Staff.)

2. ADVERSE POSSESSION § 40—PRESCRIPTION—DURATION OF POSSESSION.

Under prescription liberandi causa, Civ. Code, art. 3548, construed with article 3457 and articles 3499 et seq. and 496, an owner, not manifesting his ownership within 30 years, does not lose his ownership or his right of action to recover the property from one who within 30 years has taken possession of it; but adverse possession during 30 years is necessary for de-

prising an owner of his right to assert his title judicially.

Monroe, C. J., dissenting.

Appeal from Twentieth Judicial District Court, Parish of Lafourche; Charles T. Wortham, Judge.

Petitory action by Dominique Harang and others against the Golden Ranch Land & Drainage Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Alexis Brian, of New Orleans, for appellant. D. V. Doussan and Charles T. Starkey, both of New Orleans, for appellees.

#### Statement of the Case.

MONROE, C. J. The plaintiff whose name appears in the title and his sister Mrs. (widow) Meunier, prosecuting this petitory action as two of the children and heirs of Louis Harang, obtained judgment decreeing them to be the owners each of an undivided  $2280/25020$  interest in an undivided one-third of a tract of land containing 2,314 acres, which, for the purposes of this opinion, is sufficiently designated by the shaded area upon the subjoined "sketch." The claim, as set up in the petition, includes also the tract bounded by the 80 and 40 arpent lines, the Bayou Couverte, and the line "N 9 W," as those boundaries appear on the sketch, but as to that tract was not insisted on, since the present defendant is not asserting title thereto, and, as we understand plaintiffs have brought a suit for its recovery against one other person, who is said to be in possession. Defendant sets up title, through mesne conveyances, under a notarial act of April 8, 1880, from Oscar Lepine, who is alleged to have acquired the larger tract in which the land in dispute is included at a tax sale in December, 1873, followed by an auditor's deed in 1874, and conveyances from the tax debtors in 1875, which tax sale was confirmed, at the instance of defendant or its author in title,

by judgment of the district court for the parish of Lafourche in September, 1910; and it (defendant) pleads the prescriptions of 3, 10, 13, and 30 years, *res judicata* and *estoppel*. The trial judge held that the title relied on by defendant included no land to the westward of the line "N 9 W," as indicated on the sketch, and gave judgment for plaintiffs, from which defendant has appealed. The land represented on the sketch down to the 40-arpent line appears to have been included in a grant made by the French government to Joseph Villars Dubreuil on June 1, 1763; and all the land embraced in that grant was sold in the succession of Dubreuil to his son-in-law, Charles Jean Baptiste Florian, on March 12, 1772, and the grant was confirmed to him in 1806 by decision No. 213' of the commissioners of the bureau of lands of the district of Louisiana, according to which it was supposed to embrace 45.986½ arpents though, according to a survey made by A. F. Rightor, deputy surveyor, in October 1839, and approved by the surveyor general of this state on December 14, 1839, it embraced 121.029 acres. Florian (or Fleurlau, as the name most frequently appears in this record) and his wife left two daughters, one of whom, Marie Melanie, married Louis Charbonnet, and the other, Jeanne Marie, became the wife of Joseph Énoul Dugué Livaudais. Mrs. Livaudais died, and, on August 29, 1912, a partition was effected between her three sons (Philippe, Joseph, and Charles) and her daughter, Marie Jeanne, who shortly afterward married Louis Harang, and Mrs. Charbonnet, their aunt, whereby the Livaudais heirs acquired all the land lying to the north of Bayou Vacherie, then, also, called Bayou Cheti Tamaha, and Mrs. Charbonnet acquired all lying to the south of that bayou. The litigants, instead of producing ordinarily certified copies of the act of partition, have filed in evidence copies made by some photographic process, and referred to as "pho-



by the 40-arpent line, and east, by the Harang Canal and the lakes which are called, variously, Barataria, Ouacha, Catahoula, Des Allemands, and Salvador, we accept those conclusions. It appears from the evidence that the tract so bounded embraces somewhat less than 20,000 acres, so that, if the call of the original concession (for 45.986 $\frac{1}{2}$  arpents) be correct, the Livaudais heirs got much the better of the partition, and if the government survey of 1839, calling for 121.029 acres, be correct the advantage obtained by them was stupendous. And, as it also appears from the evidence here adduced that they considered that they had acquired, not only the land lying to the north of Bayou Cheti Tamaha, but that lying to the west of Bayou Coquille, as well, no western boundary having been mentioned in the partition and no other bayou than Cheti Tamaha having been taken into account, it is evident that, whether the advantage obtained by them is correctly represented by the figures stated or not, it was unquestionably great. The act of partition was recorded in the parish of Lafourche on December 19, 1905, 83 years after its execution.

The muniment of title next offered by plaintiffs is an instrument purporting to be an act by private signature executed by Louis and Fleuriau Charbonnet and F. Dugué, for himself and his brothers, bearing date November 17, 1813, and which, at the request of F. Dugué appearing as the vendee, was registered in the office of Narcisse Broutin, notary in New Orleans, on December 27, 1813, and recorded in the parish of Lafourche on December 14, 1912, some 99 years later. It reads as follows:

"I, undersigned, acknowledge to have sold, ceded and conveyed to Messrs. Phpe Enoul, F. Dugué and Charles Livaudais all my rights in the portion of land situated between the Bayou de la Vacherie, the lands of the Lafourche and a line which should start from the bank of the Bayou de la Vacherie, on the other side of the willows that are found at the end of the

levee of shells bordering on the said bayou, and pass between the petit bois and the chactos. All, for the sum of \$1,000, received cash—obligating myself to sign an act to the same effect, before a notary, the first time that I should go to the city. At the Vacherie, this, Wednesday, November 17, 1813.

"[Signed] L. Charbonnet.

"Fleuriau Charbonnet.

"The words five hundred erased, null; the word thousand interlined, approved.

"As well for me as, by procuration, for my brothers. [Signed] F. Dugué."

An act by the Livaudais brothers and Louis Harang, executed before Lavergne, notary in New Orleans, on January 11, 1820, shows that, as part settlement of a partnership between the appearers, Philippe Livaudais conveyed to his brothers Joseph and Charles his one-third interest in the land as described in the instrument last above quoted, concerning which third the act contains the following recital, to wit:

"Lequel tiers forme le part qui appartient au dit sieur vendeur dans la dite portion du terre, attendu qu'il en a fait l'acquisition, conjointement avec les sieurs acquireurs, de Mr. Louis Charbonnet et demoiselle Fleuriau Charbonnet, par act sous signatures privées enregistré en cette étude le vingt-sept Decembre, mil huit cent treize."

From the expression, "en cette étude," we infer that Lavergne succeeded to the office of Broutin, as notary; but, at all events, there seems no doubt that the act under private signature, thus referred to, was the act of November 17, 1813, which as we have stated, was registered in Broutin's office on December 27, 1813. The above-quoted act of January 11, 1820, was recorded in the parish of Lafourche September 8, 1906, 86 years after its execution.

By act before Felix D'Armas, notary in New Orleans, of February 26, 1828, Joseph and Charles Livaudais conveyed an undivided one-third interest in the tract described in the act under private signature, so registered in Broutin's office, to Louis Harang, the father of the plaintiffs, but the conveyance



was not recorded in the parish of Lafourche until December 14, 1912, 84 years later.

Plaintiffs offered (subject to defendant's objection) an act executed before Seghers, notary in New Orleans, on July 19, 1839, whereby Charles Livaudais makes a dation en paiement to his brother Joseph of his third interest in the Vacherie land, as heretofore described, and wherein it is recited that Joseph Livaudais requested the notary to register in his office the act under private signature of November 17, 1813, which is recited in full, and which had been registered, in 1813, in Broutin's office; the act in which it is thus recited having been recorded in the parish of Lafourche on July 19, 1839, the day of its execution.

Mrs. Marie Jeanne Touton Énoul Dugué Livaudais, first wife of Louis Harang, died probably in 1833, and in 1837, the parish judge of "Lafourche, interior," acting under a commission from the First judicial district court, made an inventory of the property found in his jurisdiction which belonged in community to her heirs and her surviving husband, included in which was "an undivided fourth of the Vacherie tract \* \* \* which Vacherie tract" reads the description, "is situate behind the riparian lots on the left bank of Bayou Lafourche, beginning at the upper limit of Evariste Lepine's plantation and ending at the lower limit of Madame Cadet Elle's plantation," which description locates the property to the westward of Bayou Coquille, as shown on the sketch, and shows that it was part of the land which the Livaudais heirs considered that they had acquired by the partition of 1812. At what time the second wife of Louis Harang died does not appear, but it is shown that he died on December 16, 1859, and that, on June 30, 1868, the plaintiffs herein, with their full sister Mrs. Cherbonnier, presented a petition to the district court for the parish of Jefferson, in which they alleged that he had left

five children by each marriage; that, according to his will, the children of the first marriage were entitled to one-third of his estate and those of the second marriage to two-thirds; that they were children of the second marriage; that the administrator had filed an account showing that he had \$11,005.89 in his hands for distribution among the heirs; that the account had been homologated, and that they were each entitled to be paid \$1,547.45%, for which they prayed judgment; and, the administrator acquiescing, there was judgment accordingly, and they were presumably paid. In January, 1913, plaintiffs and others, issue of, or descendants from both marriages, as we assume, presented a petition to the same court, which has not been copied in the transcript upon which they obtained, ex parte, a judgment recognizing them as the sole heirs at law of Louis Harang and Marie Livaudais, his wife, and sending them into possession of the estates of those decedents in certain designated proportions, "and particularly of the following described real estate," after which follows a description of the property included in the shaded area as shown on the subjoined sketch.

So far as we are able to discover, that property was never inventoried in either the succession of the first Mrs. Harang or in that of her husband, and neither she nor he ever asserted or recorded any title to it in the parish of Lafourche until about two months before the institution of this suit, save as included, by way of recital, in an act between other parties, and have never exercised any dominion over, or paid any taxes on, it. And the judgment purporting to put them in possession of it, being ex parte is, of course, inoperative as to any other person having rights to assert, and is so admitted by plaintiffs, since they are here seeking to be put in possession.

Defendant has also introduced considerable

documentary evidence, including the following:

An act of mortgage before D'Armas, notary in New Orleans, of date March 24, 1834, in which the firm of "Dugué Freres & Louis Harang," composed of Joseph and Charles Dugué (Livaudais) and Louis Harang, acknowledge an indebtedness to the firm of Plique & Le Beau of \$27,000, for which the debtor gives its notes secured by mortgage on different pieces of property, including their five-eighths interest, or more, in "the tract of land generally known under the name of 'the Vacherie' in the parish of Lafourche, interior, on the left bank of Bayou Vacherie," excepting therefrom land sold to Derbigny & Le Breton, Collins, Flowers and Nicholas, the undivided two-thirds of another tract having a front of 178 arpents on Bayou Lafourche by 40 arpents in depth, their undivided five-sixths interest in 11 slaves, and other property. The debt was for money borrowed, and seems to have been of rather a pressing character, but it does not appear to have occurred to the debtors to include the land here in dispute in the mortgage; to the contrary they seem to go somewhat out of the way to declare that the "Vacherie" lands found upon the right bank of Bayou Vacherie belong to the Charbonnet family.

An act of sale and partition before Seghers, notary in New Orleans, of date March 31, 1838, which was the result of a suit brought by children of Philippe Livaudais, then deceased, against their co-owners of lands held in indivision by them, and "commonly called the Vacherie of Messieurs Dugué Livaudais, situated in the parish of Lafourche, interior, and bounded by the inhabited lands fronting Bayou Lafourche, beginning 40 arpents from the bayou, and, on the other sides, by Bayou Bœuf, Bayou des Allemands and the plantation of Charles Derbigny, according to a plan by Bourgerol, deputy United States surveyor of date August 25, 1835," etc.

The instrument in question contains the recital that the land so described was included in the grant to Dubreull, the confirmation to Fleuriau, and the partition between Madame Charbonnet and the Livaudais heirs, and for the purposes of the sale it was divided into 60 lots, of which 6 were sold to "Joseph Énoul Dugué Livaudais," 6 to the three minors, "Énoul Dugué Livaudais," and 7, including lot 46, according to the Bourgerol plan, to "Charles Énoul Dugué Livaudais."

From other instruments offered by defendant and the recitals therein contained it appears that Louis Charbonnet, Juste Barthelmy Charbonnet, and Mrs. Anals Charbonnet, wife of François Numa Plique, were the sole heirs of Mrs. Marie Melanie Charbonnet, wife of Louis Charbonnet, and that the entire tract acquired by her in the partition of August 29, 1912, including the land lying between the 40 and 80 arpent lines, was considered as having been inherited and was disposed of by them, or their heirs and successors, or supposed successors, in title as follows:

On October 9, 1843, Louis Charbonnet sold, by the following description, to François Numa Plique a one-third interest which, according to the recitals of the act, he had just inherited from his brother Juste Barthelmy Charbonnet, to wit:

"The undivided third of a tract of land known under the name of Vacherie, situated in the parish of Lafourche, interior, in this state and measuring twenty thousand and sixteen and fifty one hundredth of an acre in area; bounded, on the one side by a bayou which separates it from the property of Mr. C. Derbigny, on the side of the Lafourche, by the property of Mr. Énoul Dugué Livaudais and on the other by Lake Barataria and the land of the United States."

On April 27, 1850, Plique sold by practically the same description the interest which he had thus acquired to Louis Le Beau.

On April 24, 1851, the one-third interest which had been inherited by Mrs. Anals

Plique from Mrs. Marie Malanie Charbonnet, was sold in Mrs. Plique's succession to Louis Le Beau. On July 5, 1867, the heirs of Louis Le Beau sold to A. B. Charbonnet an undivided one-half of an undivided one-third interest in the property.

On May 15, 1875, the heirs of Louis Le Beau represented by F. Edgar Le Beau, sold the remaining undivided half interest which the decedent had acquired to Oscar Lepine. On October 30, 1867, the succession of Louis Charbonnet sold to A. B. Charbonnet the one-third interest which the decedent had acquired as the heir of his wife.

On October 2, 1875, the succession of A. B. Charbonnet sold to Oscar Lepine, by quitclaim deed, "an undivided one-half" or whatever interest the succession might have in the property.

In the sale to Louis Le Beau, in the succession of Mrs. Plique, on April 24, 1851, the description reads:

"An undivided third of a tract known as the Vacherie Charbonnet, of which one-third already belongs to the said Louis Le Beau and the other one-third belongs to the said Louis Charbonnet. The said pasture is composed of twenty thousand and sixteen and  $\frac{56}{100}$  (20,016 $\frac{56}{100}$ ) acres, more or less, in superficies, bounded by the Bayou la Vacherie, which separates it from the plantation, now or late, of Charles Derbigny and which is navigable as far as Lake Ouacha, or Barataria, by Bayou Catahoula, and by lands, now or lately, belonging to Messrs. Énoul Dugué Livaudais, the whole, according to a plan of A. H. Rightor, deputy surveyor."

In March, 1871, the Derbigny plantation was sold by Mr. Derbigny to the Consolidated Association of the Planters of Louisiana.

In 1870, 1871, and 1872 there was an assessment in the parish of Lafourche, in the name of "Le Beau and Charbonnet," as follows:

"Twenty thousand (20,000) acres, being back of the plantation of the Consolidated Association of Planters and contains fractions of T. 15 and 16 S. E. D. R. 18 or 19 E."

In December, 1873, the tax collector, proceeding in accordance with section 4 of Act 143 LA.—32

47 of 1873, made an adjudication of the land so assessed to Oscar Lepine, and on December 18, 1873, executed a deed, in which he described it as follows, to wit:

"A certain tract of land situated in the parish of Lafourche, interior, and lying back of the plantation belonging to the Consolidated Association of the Planters of Louisiana, in the settlement known as Vacherie Dugué Livaudais and designated on the map of the parish of Lafourche as part of the B. Florian claim and containing fractions of townships 15 and 16, South Eastern district, range 18 or 19, east, the number of acres unknown, but, according to the assessment rolls, the tract of land above described and sold is supposed to embrace an area of about 20,000 acres, the same having been seized for the payment of taxes due by Le Beau and Charbonnet, as owners thereof, according to the tableau and assessment rolls for the years 1870, 1871 and 1872."

The auditor's deed, of date July 23, 1874, contains the same description. Lepine, it appears, went into possession of, and pastured his cattle upon, the entire tract lying to the northeast of the 40-arpent line, as indicated on the sketch, until April 8, 1880, when he made a sale to John R. Gheens of the cattle and part of the land, the latter being described as:

"All that portion of the following described tract of land lying and being back of the 80-arpent line from Bayou Lafourche, to wit: A certain tract of land known and designated as Vacherie Charbonnet, comprising twenty thousand and sixteen arpents and fifty-six hundredths of an acre, in superficies, situated in the parish of Lafourche, in this state, and bounded by the Bayou la Vacherie which separates it from the plantation, now or late, of Charles Derbigny and which is navigable as far as Lake Washa, or Barataria; by Bayou Catahoula; and by lands, now or late, belonging to Enoul Dugué Livaudais; the whole according to a plan of A. H. Rightor, deputy surveyor. The portion of land lying and being in front of the said 80-arpent line is reserved and not included in this sale—was sold by the present vendor to Messrs. Forst and Le Blanc, though the act of sale is not yet passed."

Gheens took over 400 head of cattle with the land and he and his successors in title pastured their cattle there for a number of years, and discontinued so doing on account of a season of high water, indicating in that

way, and otherwise, that they considered that the shaded tract as shown on the sketch was included in the sale from Lepine.

On January 24, 1890, Gheens sold the property to the Golden Ranch Sugar & Cattle Company, and that company, in July, 1910, instituted suit in the district court, alleging that at the time of the tax sale the property appeared to be owned by Louis Le Beau, Arthur B. Charbonnet, and Mrs. George Richard Beard, and praying for citation of Mrs. Beard, whose whereabouts were alleged to be unknown, through a curator ad hoc and for judgment confirming the sale and quieting the title resulting therefrom; and on September 27, 1910, there was judgment accordingly. The property then passed back to Gheens, by whom it was conveyed to Garnett and Morrill, who in November 3, 1910, conveyed it to the plaintiff, together with other lands, by an act before Loomis, notary in New Orleans, which declares that:

"The lands herein sold are delineated upon a plat compiled by Daney & Waddill, civil engineers of New Orleans, duly paraphed by me, notary, and on file and of record in my office."

The plat thus referred to bears date January 3, 1906, and was prepared under the following circumstances: John R. Gheens and his brother constituted in effect the Golden Ranch Sugar & Cattle Company, and in 1905 they were negotiating with some Chicago capitalists for the sale of its property, including what had been the Derbigny plantation. The representatives of the prospective purchasers found some objections to the title that was tendered, and, among them, that it did not include the tract here in dispute. Mr. Gheens was of opinion that the title did include that tract, and the negotiations with the gentlemen from Chicago having failed in their purpose, he employed Mr. Waddill, of Daney & Waddill to make a survey of the entire holdings of the Golden Ranch Sugar & Cattle Company, without reference (so Mr. Waddill testifies, though

Mr. Gheens denies the restriction) to the line "N 9 W," and the result of that employment was the compilation above mentioned. The difference of opinion appears to have arisen from the fact that there is in existence a plat of survey with field notes of the entire Fleuriau grant, made by A. F. Rightor, deputy surveyor, on October 18, 1839, which is an official document, duly approved by the Surveyor General, and placed of record in the Land Office, and that there was also produced during the negotiations mentioned a lithographed auctioneer's plan, or advertisement, purporting to be a "survey of part of the claim of Charles F. B. Fleuriau," also by A. F. Rightor, deputy surveyor, whereon appeared the line "N 9 W," which plan was thought by the Chicago party to be that referred to in the act of sale from Lepine to Gheens, of April 8, 1880, and which line was thought to be that described in the act under private signature of November 17, 1813, upon which plaintiffs predicate their claim. The particular copy of the lithograph in question which was offered in evidence, as an ancient document, was produced by Mrs. F. Edgar Le Beau, widow of the gentleman by that name, who testified that she had found it among her husband's old papers, that she had often seen it in his hands, and that certain pencil memoranda which appear on it are in his handwriting. The paternity of the document is, however, not established; it does not appear ever to have been attached to, or identified with, any act of conveyance, or deposited or recorded in any public office; and, though apparently intended for use as the auctioneer's advertisement of land to be sold in the succession of Mrs. Plique, could not well have been so used, since it purports to advertise, as the property of that succession, the whole of a body of land of which the succession owned but an undivided one-third, and it attributes to the tract indicated on our sketch as lying to the eastward of the line N 9 W an area of

20,016.56 acres, whereas the entire body of land, including the shaded area and that lying between the 80 and 40 arpent lines, contains considerably less than that acreage, and the particular tract indicated contains only about 12,000 acres. The plan appears to have been taken from the original survey by Rightor, to which was added the line "N 9 W, on the west, or south west side of which is the name Énoul Dugué Livaudais" in pencil, the writing, it is said, being that of F. Edgar Le Beau, the husband of the lady who produced the document. Looking at it, as a document of the kind is ordinarily viewed, i. e., upon the theory that the bottom represents the south side of the lands exhibited, the line N 9 W appears to run rather west 9 degrees north than north 9 degrees west, which makes it appear that the "lands of the Lafourche" lie to the south of the line, whereas the line is supposed to have been run N 9 W from those lands, and there lie to the westward of it, first, the shaded area, and, next, "lot 46, Bourgerol plan," which was acquired by Charles Énoul Dugué Livaudais in the partition of 1838. Among the lands of the Lafourche it will be observed that there is a tract bearing the name "J. E. D. Livaudais," which is said to bound the upper tract for a distance of a mile and a quarter, but leaving, as plaintiffs assert, a gap in the boundary on that side, as described in defendant's title of some four or five miles.

The document now under consideration appears to include all the land represented on our sketch, to the westward of the line N 9 W, and more besides, but the acreage, "20,016.56 acres," is inscribed on the tract lying to the eastward of that line. It (the document) bears the legend:

"Sale without Reserve of 20,016.56 Acres of Land. Succession of Mrs. Anais Plicque, Wife of P. L. Plicque, by P. E. Tricou, Auctioneer.

"By virtue of an order from the honorable the second district court, \* \* \* will be sold, on Monday, April 7, 1851 \* \* \* the property hereinafter described:

"A tract of land known as 'Vacherie Charbonnet,' situated in the parish of Lafourche, interior. This land is bounded by Bayou la Vacherie, which divides it from the plantation of Charles Derbigny and is navigable through its entire course to its junction with Lake Washa, or Barataria; by Lake Washa, or Barataria; by Bayou Catahoula; and by the tract of land, now or formerly, belonging to Messrs. Énoul Dugué Livaudais, the whole according to a plan drawn by A. F. Rightor, deputy surveyor."

And then follows rather a glowing description of the land, its hunting and fishing advantages, etc.

The act of sale, of date April 24, 1851, before Mazureau, notary, contains the recital that there had been adjudicated—

"to Mr. Louis Le Beau \* \* \* [not the whole property, as advertised, but] \* \* \* the undivided one-third of a tract of land [following the description contained in the legend on the plan] the whole in conformity with a plan by A. F. Rightor, deputy surveyor."

The inference to be drawn from the confusion thus disclosed would seem, perhaps, to be that the person who prepared the plan, and, presumably the legend purporting to explain it, proceeded and was written upon the theory that the "Vacherie Charbonnet" consisted of the tract lying to the eastward of the line "N 9 W" and north of the 40-arpent line, or "the lands of the Lafourche," that that tract contained 20,016<sup>56</sup>/<sub>100</sub> acres, and that the whole of it was to be sold; and, as that impression was entirely erroneous, it would follow that the sale, as evidenced by the notarial act, was not made according to the plan, nor could have been so made. Beyond that, as the plan was not identified by date, registry or deposit with the act, and as Rightor may have drawn another plan, or many more, no one can say that the particular plan which has been offered in this case is that to which the act refers, and still less can any one say that Mr. Gheens, buying property nearly 30 years later, in the parish of Lafourche, where, so far as we are informed, that plan had never been seen or heard of, should have assumed that it, rather than

the official survey by Rightor, duly recorded in the proper office, was "the plan of A. F. Rightor, deputy surveyor," to which his act of purchase referred. In view of the use of the name, "Énoul Dugué Livaudais" in the description, in the sale from Lepine to Gheens, it may be pertinent to explain that the Livaudais brothers, and the sister, seem all to have borne the names Énoul Dugué, and, as was not altogether uncommon in some families of French and Spanish descent, they used their other family names quite frequently to the exclusion of the name derived from their father. Thus in the partition of 1812 François Joseph Énoul Dugué Livaudais appears, by signature, as F. Dugué; Charles Énoul Dugué Livaudais, as C. Livaudais Dugué, Philippe Énoul Dugué Livaudais, as Phpe Énoul Dugué, Marie Jeanne Touton Énoul Dugué Livaudais, as Touton Énoul. In the instrument under private signature of November 17, 1813, upon which plaintiffs rely, the Livaudais brothers are described as Phpe Énoul, F. Dugué, and Chas. Livaudais. The signature representing the three is "F. Dugué." Mrs. Marie Melanie Charbonnet is represented by the signature "Fleuriau Charbonnet," and in the act of January 11, 1820, between the Livaudais brothers and Louis Harang, the person who is supposed to have affixed that signature is referred to as "demoiselle Fleuriau Charbonnet." When to that we add that the Vacherie Dugué Livaudais was frequently confused with what was properly, after the partition of 1812, the Vacherie Charbonnet, and that the Vacherie Charbonnet was, from that date, partly bounded, on the west and south, by Énoul Dugué Livaudais lands, the fact that it was so described in the sale from Lepine to Gheens is not surprising. The description is at least as definite as applied to the Vacherie Charbonnet, meaning the entire tract acquired by Mrs. Charbonnet in the

partition of 1812, as is the description in the act of partition or that in the act by private signature of November 17, 1813, on which plaintiffs bring this action.

A year or two after the failure of the negotiations with the Chicago people, and five or six years prior to the institution of this suit, Mr. Gheens, acting upon advice, built a fence upon the 80-arpent line, as an additional method of asserting possession of the land here in dispute; and, as plaintiffs allege actual possession in the defendant company, we understand it to be conceded that such actual possession has been maintained at least since the fence was built.

Dominique Harang, plaintiff herein, was born within a mile or two of the land in dispute, and made it his hunting ground, whenever it so pleased him, during the greater part of his life; but though he and his co-plaintiff attained their majorities as far back as 1868, the title which they now set up was never, as such, registered in the parish of Lafourche until 1912, and no claim under that title appears to have been asserted until within a short time prior to the bringing of this action, in December, 1913.

#### Opinion.

[1] The question which meets us at the threshold is, whether the plaintiffs have now the right to prosecute this suit, or whether the delay within which that right might have been exercised has not elapsed; in other words, whether the action is not barred by the prescription of 30 years, *liberandi causa*. "Title xxiii" of the Civil Code treats of "Occupancy, Possession and Prescription"; chapter 3 of that title of "Prescription," and section 1 of that chapter, under the rubric, "General Provisions," contains the following:

"Art. 3457. \* \* \* Prescription is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law. Each

of these prescriptions has its special and particular definition.

"Art. 3458. \* \* \* The prescription by which the ownership of property is acquired, is a right by which a mere possessor acquires the ownership of a thing which he possesses by the continuance of his possession during the time fixed by law.

"Art. 3459. \* \* \* The prescription by which debts are released is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim."

Section 2 of chapter 3 deals with the "Prescription by which the Ownership of Property is Acquired," generally known as the "prescription acquirendi causa," and we pretermit its consideration, though it also is pleaded and urged on behalf of defendant, further than to call attention to article 3499, which declares that:

"The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith."

Section 3 of chapter 3 deals with the "Prescription which operates a Release from Debt," and the following articles are to be found therein, to wit:

"Art. 3528. \* \* \* The prescription which operates a release from debt discharges the debtor by the mere silence of the creditor, during the time fixed by law, from all actions, real or personal, which might be brought against him.

"Art. 3529. \* \* \* This prescription has also the effect of releasing the owner of an estate from every species of real rights, to which the property may have been subject, if the person in possession \* \* \* has not exercised it during the time required by law.

"Art. 3530. \* \* \* To enable the debtor to claim the benefit of this prescription, it is not necessary that he should produce any title, or hold in good faith; the neglect of the creditor operates the prescription in this case."

"Art. 3548. \* \* \* All actions for immovable property, or for an entire estate, as a succession, are prescribed by thirty years."

Under "Title 1. Of Successions" (chapter 6, section 2) we find:

"Art. 1030. \* \* \* The faculty of accepting or renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables."

The article last quoted was applied in Succession of Waters, 12 La. Ann. 97, and it was there held, quoting the syllabus, that:

"The heir who has permitted 30 years to elapse without having done any act showing an intention to accept the succession is barred by prescription from any rights as heir."

Chief Justice Merrick, as the organ of the court, said, in the course of the opinion handed down by him:

"Did the article read, simply, the faculty of accepting an inheritance becomes barred by the lapse of time required for the longest prescription of the rights to real estate, it would present no difficulty, and we could have no hesitation in concluding that the heir who should suffer 30 years to elapse without evincing his intention to accept a succession then opened would lose his right of accepting, and the inheritance could not be claimed by him, into whose hands whosoever it might have gone."

A difficulty was found, however, in construing the prescription of the "faculty of accepting" with that of renouncing, and, after considering the views of Marcadé and other French commentators, with no satisfactory result, the court said:

"We therefore, conclude that the Legislature intended to declare, in one part of the article, that, if he who is called to an inheritance is silent for 30 years, and does no act evincing his acceptance of the succession, he is barred by prescription. We do not find it necessary to put any construction upon the second portion of the article. It will be in time to consider the difficulties presented by it whenever the case arises in which their explanation, if possible, is required."

Mr. Justice Spofford, in a concurring opinion, seems to reach the conclusion that, construing the provisions of the article in question with the provisions of other articles of the Code, as well as *inter sese*, it is impossible to apply the prescription of the faculty of accepting without also giving effect to the prescription of the faculty of renouncing, differing in that respect from Marcadé, who held that the similar article of the Code Napoléon merely established a prescription against the right to choose between accept-

ance or renunciation, and operated an acceptance at the end of the period:

"I think," said the learned justice, "the Legislature of Louisiana intended, in article 1023 [now 1030], to fix a term of prescription against the right of acceptance, and to intimate the consequence of its lapse without an acceptance; that consequence, I think, is that the successor becomes a stranger to the succession."

We are not here dealing with the prescription of the faculty of accepting or renouncing a succession which is a faculty that may be exercised, at any time, by any person, *sui juris*, without let or hindrance from or awaiting the action of, any other person. The plaintiffs in this case accepted the succession of their father in 1868, when they demanded and obtained judgment for their respective shares of the assets of the succession, then in the hands of the administrator, but, having done so, they thereafter remained silent for 45 years, making no claim to, and bringing no action for the recovery of, the immovable property which they now allege devolved on them by virtue of that acceptance, and the action which they now bring appears to be one which the law declares that they have no standing to bring. Whilst, however, in the matter of the prescription of the faculty of accepting or renouncing a succession, a definite point of departure is established by the death of the *de cuius*, and the heir who desires to accept or renounce is not obliged to find another person, contradictorily with whom to take such step, the bringing of an action involves the finding of a cause of action and of a person against whom it may be asserted; and, until the cause and the person are found, and the action will lie, it can hardly be said that any prescription will run against the right to bring it. It is true that article 3459 declares that "the prescription *liberandi causa*, or that by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal,

when the creditor has been silent for a certain time without urging his claim," but a release from debt implies the existence of a debtor, and in the matter of immovable property implies, in the case provided for by the article, the existence of one who withholds the property from the owner, under an adverse claim, and which therefore requires the bringing of an action for its recovery. If, then, during 30 years or a longer period, no one asserts, or pretends to have acquired, any adverse rights to such property, whether of title or possession, and the rights of the owner are not thereby challenged or invaded, no occasion can arise for his breaking his silence concerning them, since, under such circumstances, he is at liberty to exercise or enjoy them in his own way. From the moment, however, that the rights of the owner, not in possession, are challenged, or invaded, by one who sets up an adverse claim of title, or possession, the relation of debtor and creditor, within the meaning of the law declaring the prescription *liberandi causa*, is established, and if the pretensions of the debtor are of such a character as to authorize or require an action at law, on the part of the creditor for the vindication of his rights, the period, at the end of which the prescription against such action becomes effective, begins and, if the creditor remains silent until it is completed, he loses, not only his right to complain that the title asserted by the debtor is defective, or no title, or that his possession is not such as to enable him to hold the property as owner, but the right to bring any action at all, since the prescription operates as "a peremptory and perpetual bar to every species of action, real or personal," in which his complaints might be urged. "Prescription attaches to a right from the moment that it can be exercised." *Andrews v. Rhodes*, 10 Rob. 53; *Darby v. Darby*, 120 La. 850, 45 South. 747, 14 L. R. A. (N. S.) 1208, 14 Ann. Cas. 805.



"To enable the debtor to claim the benefit of this prescription it is not necessary that he should produce any title;" nor is it necessary that he should hold in good faith; nor, if possession be relied on, does it make any difference whether it be actual or constructive.

"The prescription which operates a release from debts discharges the debtor, by the mere silence of the creditor during the time fixed by law, from all actions, real or personal, which might be brought against him." The right which plaintiffs are here asserting might have been exercised in 1873 or 1874, when Oscar Lepine recorded his tax title and went into possession of the property which had been assessed to Le Beau and Charbonnet as embracing an area of about 20,000 acres, and which must have included the tract in dispute in order to have embraced that area. To the contention that the description did not identify the property and that Lepine did not take actual possession of the tract in dispute, the answer is that he went into possession of the property which had been acquired, and was held, by Le Beau and Charbonnet, under recorded titles, as the "Vacherie Charbonnet"; that no other title to the property so described was at that time recorded in the parish; that, whether the tract in dispute was then included in the Vacherie Charbonnet or not, he had good reason to believe that it was, and, acting upon that belief, turned his cattle loose, to graze upon that tract as upon any other part of the property, and later sold, or agreed to sell, to Foret and Le Blanc the tract lying between the 80 and the 40 arpent lines, which is as much a part of the land described in the title set up by plaintiffs as the tract included in the shaded area, and in fact was actually claimed by them in this suit, and is now claimed in another suit against other defendants. Moreover, Gheens considered that the tract in question was in-

cluded in his purchase from Lepine, and from that time (1880) has always assumed the quality and exercised the rights of an owner, all to the knowledge of the plaintiff, Dominique Harang, as will be understood by the following testimony given by Harang, in an examination by his own counsel, to wit:

"Q. Mr. Harang, did you ever erect a cattle shed, or cattle pen, on the land claimed by Mr. Gheens? A. Yes, sir. Q. Did you ever converse with Mr. Gheens with reference to the destruction of that cattle shed? A. Yes, sir. Q. Please relate to the court what took place on that occasion. A. Mr. Gheens called at my house and told me that he heard that I had erected a pen on his property. I told him that was true, I had erected a pen, but that I did not know that it was his property. He claimed that it was, and that he was coming there and burn it, and I told him that, whenever he felt ready, if he would notify me of the day and hour, I would meet him with a can of five gallons of gasoline and help him burn it. I asked him if he really meant what he said; he smiled and said, 'Yes.' Q. What year was that? A. 1882 or 1883."

On his cross-examination, he said that, as subsequently ascertained, the pen was not on the land claimed by Gheens, but was on the tract lying between the 80 and 40 lines, which had been sold by Lepine to Foret and Le Blanc.

Our conclusion then is that the prescription of 30 years *liberandi causa* is applicable to the case, and should have been sustained. To the contention that its application amounts to a taking of plaintiffs' property without due process of law we answer, in the language of the Supreme Court of the United States, quoted with approval by this court, as follows:

"Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been, from remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177; *Terry v. Heisen*, 115 La. 1083, 40 South. 461.

For the reasons thus assigned, the judgment appealed from is set aside and annul-

led, the demands of the plaintiffs rejected, and this suit dismissed at their cost in both courts.

O'NIELL, J., dissents. PROVOSTY, J., dissents and hands down reasons. See 79 South. 777.

LECHE, J., concurs in the decree.

#### On Rehearing.

PROVOSTY, J. The three Messrs. Livaudais made a partition with their aunt, Mrs. Charbonnet, of a large area of swamp land situated in Lafourche parish, near the Gulf. Mrs. Charbonnet got all that part situated south of a bayou known as Bayou Vacherie. Of this land the defendant's brief says:

"The land is wild unclaimed swamp land. Until recently it was of practically no value. The whole 20,000 acres was at one time appraised at \$900, less than 5 cents per acre."

In 1813, one year after the partition, Mrs. Charbonnet sold to the Livaudais brothers for \$1,000 the southwestern part of this area by the following boundaries:

"The Bayou Vacherie, the back line of the lands fronting on Bayou Lafourche, and a straight line which will have to start from the bank of Bayou Vacherie on the other side of the willows which are at the end of the embankment of shells which borders said bayou, and which line will go and pass between the little woods and the chactos."

The property thus sold is the property in controversy. The defendant holds title under Mrs. Charbonnet, by mesne conveyances, and the plaintiffs, under the Livaudais brothers. The line, which was to start on the bank of Vacherie bayou at the end of the embankment of shells and go and pass between the little woods and the chactos, was located years ago by a surveyor named Righor. One question in the case is whether this line was thus correctly located, and, if not, whether it is possible at this late day to locate it more correctly. We think the evi-

dence shows that this line was correctly located. In several of the deeds under which defendant holds, this survey is referred to as part of the description of defendant's land. The deeds also refer to the land of the Messrs. Livaudais as one of the boundary lines. Very true, defendant's learned counsel would apply the latter references to a tract of land owned by a Mr. Livaudais 40 acres further, so that the land in dispute would be included in defendant's title deeds. But this distant tract would be a boundary for the property for only about one-fifth of the distance, leaving some four miles of the distance without any boundary line at all on that side; and, in the second place, the references are to the lands of "the Messrs. Livaudais," which could only mean the three Livaudais brothers, and not to Mr. Livaudais. Mrs. Charbonnet certainly did sell to the three Livaudais brothers the southwestern part of the area acquired by her in the partition, and this line was certainly surveyed and platted years ago as correct.

Defendant's more serious reliance is upon a tax sale and on prescription. The tax sale was made in 1873 for taxes assessed to Le Beau and Charbonnet, two of defendant's authors in title, and by the following description:

"A certain tract of land situated in the parish of Lafourche, interior, lying back of the sugar plantation belonging to the Consolidated Association of Planters in the settlement known as the Vacherie Dugué Livaudais, and designated on the map of the parish of Lafourche as a part of the B. Florian claim and containing fraction of T. 15 and 16 S. E. district, R. 18 or 19 E. The number of acres unknown, but according to the assessment rolls the tract of land above described and sold is supposed to embrace an area of about 20,000 acres, being the property of Le Beau and Charbonnet, as per assessment roll of the state of the years 1871 and 1872, to satisfy a debt due said state for the unpaid taxes of 1871 and 1872."

Of this description the plaintiffs' brief correctly says:

"The description (?) in the tax deed places the property in different townships and ranges,

3 to 12 miles from our property; it gives absolutely no boundaries; it says the property is in the Vacherie-Livaudais, whereas our property is in the Vacherie-Charbonnet; it says it is the property of Le Beau and Charbonnet, whereas these gentlemen never owned our property; it says it is back of a certain plantation, whereas our property is in front of said plantation."

The tax purchaser caused his tax title to be confirmed by a judgment contradictorily with a curator ad hoc. In this judgment, and in the petition praying for the confirmation, the property sold, the sale of which is sought to be confirmed, is described as follows:

"A certain tract of land known as the Vacherie-Charbonnet, comprising 20,016 arpents and  $\frac{56}{100}$  of an acre in superficies, and bounded by Bayou de la Vacherie, which separates it from the plantation now or late of Chas. Derbigny, and which is navigable as far as Lake Washa, or Barataria, by Bayou Catahoula and by lands now or lately belonging to Énoul Dugué Livaudais, the whole according to a plan of A. F. Rightor, deputy surveyor."

Suffice it to say of this tax sale thus confirmed that the description in it does not cover plaintiffs' land. The line of the Rightor survey, or, in other words, plaintiffs' land, is given as one of the boundaries.

Defendant relies upon the prescription of 30 years both *acquiritandi causa* and *liberandi causa*.

Defendant does not pretend to have ever taken, or had, possession, except until recently, otherwise than in accordance with its titles; and these, as already shown, do not cover plaintiffs' land. Until recently the only kind of possession defendant had ever taken was by turning a herd of horned cattle loose to graze on this 20,000 acres of swamp land; it not being denied that the land was unfenced, until recently, and that the cattle of the entire neighborhood enjoyed the same grazing privileges.

It is also to be noted that in calling the area "wild swamp," the defendant's counsel pays it a compliment which the greater part

if it does not deserve, being, as we judge from the maps, merely low Gulf coast marsh, with coteaux, or ridges, here and there on which cattle can safely range.

Much importance is attached by defendant, in connection with possession, to the fact that the titles of plaintiffs were not recorded in the recorder's office of the parish of Lafourche, whereas those of defendant were. But the registry of titles has absolutely nothing to do with the question of actual possession *vel non*. Actual possession can be shown only by visible outward acts upon the property itself of a character to challenge the attention of the owner of the property. The recordation of some document in the recorder's office is not such an act. An owner does not have to go and examine the records to see whether some one has not been recording something against his property, and, as a matter of fact no owner ever does such a thing. Article 3508 of the Code is express that the possession which is acquired without title, "extends only to that which has been actually possessed," and the titles recorded by defendant, if the Rightor survey line be adopted, did not include plaintiffs' land.

As to the nonregistry of plaintiffs' titles in the recorder's office of the parish of Lafourche at the time the several acts were passed, such recordation was unnecessary. *Parish Board of School Directors v. Edrington*, 40 La. Ann. 637, 4 South. 574. Such registry as was then required, namely, registry in the office of a notary, was had.

[2] Defendant has not shown the possession required by law for the prescription *acquiritandi causa*; and, in fact, defendant's more serious reliance evidently is upon the prescription *liberandi causa* provided for by article 3548, C. C., reading:

"All actions for immovable property, or for an entire estate, as a succession, are prescribed by 30 years."

The contention is that an owner who, as plaintiffs did in this case, suffers 30 years to elapse without manifesting his ownership by some act, the property lying out for that length of time as if abandoned, loses his ownership, or, which is the same thing, loses his right of action to recover the property from any one who may have taken possession of it, even though the suit is filed the day after, or the day itself on which, the possession is taken.

The adoption of that conclusion would, to use the energetic expression of Baudry-Lacantinerie & Tissier, "bouleverser," i. e., throw into confusion, topsy turvy, our whole theory of prescription. De la Prescription, No. 594. It dispenses with possession; whereas possession, actual or constructive, is the very foundation of prescription. Prescription without possession is a house without a foundation. The rationale, *raison d'être*, function of prescription, is to quiet and stabilize things in the interest of society, so that, after a certain length of time, the possessor may not be disturbed and the debtor may not be troubled. By this new prescription the real owner is disturbed in his ownership and constructive possession, is thrown out of court, in the interest and for the protection of some usurper utterly without standing save his own wrong. A medicine is thereby turned into a poison.

The article of the Code Napoléon corresponding with our article 3548 reads:

"Art. 2262. All actions, real as well as personal, are prescribed by thirty years, without the one who invokes this prescription being obliged to produce a title, or its being possible to oppose to him the exception resulting from bad faith."

The question of whether this article, which, it will be observed, makes no mention of possession, dispenses the party pleading this prescription as against the petitory action or action in revendication of real estate from the necessity of showing the pos-

session requisite for the prescription of 30 years *acquirandi causa* was raised for the first time in the case of *Orvise v. The Brothers of St. Viateur*, Sirey, 1879, vol. 1, p. 313, *Journal du Palais*, 1879, p. 777. In that case Orvise, the plaintiff, sued to recover a tract of land which his father had sold to the defendant religious association more than 30 years back. His ground of action was that the sale had been null, had not divested the ownership of his father, because, religious organizations being prohibited in France, these religious brothers had had no legal existence, and hence could not possibly have acquired the property. In the course of his argument Attorney General Robinet de Cléry invoked this article 2262 as a bar to plaintiff's action in revendication as well as to the action in nullity of the sale. The court sustained the prescription, but, as shown in the argument of Counselor Pothier, reproduced in *Journal du Palais*, 1907, First Part, p. 276, sustained it only as to the action in nullity, not as to the petitory action. This argument of the Attorney General, reported in an annotation to the said decision as found in 1 *Dalloz Rep.* for 1880, gave rise to a discussion of the question by the law-writers of France. The reporter of the decision, a Mr. Beudant, indorsed the views of the Attorney General; and, so far as we have been able to ascertain, only one law-writer, Lacour, and that only in a review article, has coincided with him. All the other law-writers of France who have thought it worth while to discuss the question are on the other side: Laurent, vol. 32, No. 384; Huc, vol. 4, No. 245, and vol. 14, No. 434; Aubry & Rau (4th Ed.) vol. 2, pp. 322, 395, and vol. 8, p. 429; Baudry-Lacantinerie & Tissier (3d Ed.) Prescription, Nos. 593, 594, and long list of authorities cited in note 1. Finally, the question came up squarely before the Court of Cassation in the case of *Cohu v. Morvan*, *Journal du Palais*, 1907, p. 273, and

the prescription was held not to apply to the petitory action. The decision is short:

"Considering that, notwithstanding the sweeping terms of article 2262, according to which all actions, real as well as personal, are prescribed by 30 years, this text does not apply to the action in revendication by the owner who has been dispossessed of his real estate, that, ownership not being lost as the result of non-usage of the thing, the action in revendication which protects and sanctions this right can be exercised as long as the defendant does not establish that he has himself become owner of the real estate in question, as the result of a possession exhibiting all the characteristics required for the prescription *acquirandi causa*, whence it follows," etc.

The question had previously come up in Belgium, whose Code is on this point precisely the same as that of France, and been decided in the same way. See note to Laurent, vol. 32, p. 404.

Very true, article 3548 says that all actions are prescribed by 30 years, and says nothing of possession; but, says Morlon, in his commentary on article 2262, you must add, "under the conditions regulated by law." The clause here in quotation marks he takes from article 2219, C. N. (3457 of our Code). He continues:

"As to real actions, prescription is composed of two elements, lapse of time and possession. For I cannot lose my property simply, or the action in revendication which follows it, from the mere fact that I do not exercise it during 30 years. I can lose it only as the result of some one else acquiring it; and, for acquiring it, it is necessary, according to article 2229, to possess it for the required length of time."

Laurent, after having quoted the reason which Bigot-Preaenu, as the orator of the government in advocating the adoption of article 2262 of the Code Napoléon, had assigned, goes on to say:

"The assignment of reasons which we have here transcribed admits as a thing not doubtful that the 30 years' prescription is acquisitive, and that it is founded upon possession. Some have contested this, basing themselves upon article 2262, where nothing is said of possession, whence the conclusion that the owner lost his right from the simple fact that he failed to exercise it during 30 years. To do this, was to take advantage of an incomplete drafting,

and to go in opposition to the fundamental principle governing property. The owner does not lose his right as the result simply of his not using it; his right is to use or not to use his property. How can he lose his right by abstaining from using it when his right is not to use it? He continues to hold possession, and all the rights attached to it so long as another has not usurped it and dispossessed him. This is the unanimous doctrine of the law-writers, ancient and modern. \* \* \* Prescription, then, may be invoked against the owner who revendicates only when the opposing party sets up against the owner an adverse possession uniting the conditions required by article 2229."

From Baudry-Lacantinerie & Tissier, *De la Prescription*, No. 594:

"The truth is there is no distinction to be made between the right of ownership and the action in revendication. Prescription is possible against the one or the other only if another person has possessed during the time and under the conditions required by law. Otherwise, by means of the prescription by which the action in revendication is extinguished, we should come to protecting a possessor who did not unite in himself the conditions hereinabove expounded, one who possessed only by precarious title, or whose possession had been discontinuous, unless it should be preferred in such a case to attribute to the state an ownership which had not been lost by the owner nor acquired by any one else. At all events there would be great injustice. Prescription which has been devised for making ownership more secure would result in the very opposite."

The arrangement, distribution, or classification of the subject-matter of prescription in the Code Napoléon is not the same as in ours. The two prescriptions, *liberandi causa* and *acquirandi causa*, are there dealt with together, instead of separately as in our Code. Basing himself upon this, the learned counsel for the defendant in this case contends that these French decisions and authorities are not applicable. The answer to that argument is that the principles of prescription embodied in the two Codes are absolutely the same. Both Codes are very largely, if not entirely, derived in the matter of prescription from Pothier's treatises, *De la Propriété*; *De la Possession*; *De la Prescription*; *Introduction aux Coutumes D'Orleans*, at the part dealing with Prescription; and Obligations. The French Code is more condensed than

ours, not expressing those things which follow as logical consequences; whereas ours expresses those consequences. That is the only difference. But what is thus expressed in our Code and not found in the Code Napoléon is found, mostly in the same words, in Pothier. Pothier in his treatise *De la Propriété*, has a chapter headed "Comment se Perd le Domaine de Propriété," "How Ownership is Lost." In this chapter he enumerates all the modes in which ownership may be lost; and any one familiar with his works knows that he may be trusted not to have overlooked or omitted any. Among the modes thus named by him, this mode of a prescription of 30 years *liberandi causa*, unaccompanied by possession, is not found. Of the prescription of 30 years he says:

"No. 276. Finally, we lose, without our consent, and even without our knowledge, the ownership of a thing belonging to us, when the one who has the possession of it acquires it by prescription. As soon as this possessor has, either by himself or through others, accomplished the time required for prescription, the law which has established the prescription, deprives us de plein droit [absolutely, pleno jure] of the dominion of ownership which we had of the thing, and transfers it to this possessor."

This is practically what our Code expresses by article 496, under the title "Of Ownership."

"Art. 496. The ownership and the possession of a thing are entirely distinct.

"The right of ownership exists independently of the exercise of it. The owner is not less the owner because he performs no act of ownership, or because he is disabled from performing any such acts, or even because another performs such acts without the knowledge or against the will of the owner.

"But the owner exposes himself to the loss of his right of ownership in the thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription."

Where the framers of our Code would have got this idea of a prescription running against the owner of real estate in the absence of continuous and uninterrupted adverse possession on the part of the person in

whose favor the prescription was running, or, indeed, run against him without at the same time and ipso facto running in favor of some one else, it would be hard to say. Certainly not from the civil law. The civil law books will be searched in vain for any such idea, save for the discussion already referred to as having arisen under article 2262 of the Code Napoléon. At common law such a prescription could not possibly run against the owner, for the fundamental principle there is that:

"One claiming land adversely must, in order that his claim may be effective as against the owner, be in actual possession thereof, for without such occupancy the law assumes the possession to be in the owner of the legal title." 1 R. C. L. p. 692.

"The constructive possession of land is always in the owner of the best title, unless he has renounced it, and this constructive possession can never be ousted by anything less than an actual possession maintained for the necessary period." 2 C. J. 53.

And see 2 C. J. 53, note 28, where the Supreme Court of Tennessee is quoted as follows:

"The inference that, because by the recent statute a mere claim of title, unaccompanied by adverse possession, gives a right of action against such claimant, the statute of limitations therefore attaches in his favor, by the mere force of such adverse claim, is utterly destitute of foundation in law."

This principle is embodied in article 3434 of our Code:

"Since the use of ownership is to have a thing in order to enjoy it and to dispose of it, and that it is only by possession that one can exercise this right, possession is therefore naturally linked to the ownership."

And where there are two constructive possessions, it is that of the best title which prevails; or, in other words, where there are two titles, possession follows the true title. *Moore v. Morgan's La. R. R. Co.*, 126 La. 888, 53 South. 22.

The whole argument of defendant's learned counsel is founded upon the supposed ab-

sence of all qualification to the terms of article 3548. The argument is that "all actions," without qualification, with nothing said as to the necessity of adverse possession, are said by this article to be prescribed by 30 years, and that therefore this action in revendication is prescribed. The argument is founded upon the strict letter of the article. But the rigid letter of said article is to be tempered and qualified by the necessary general principles of prescription. Such, for instance, as those relating to imprescriptibility (for some actions are imprescriptible), interruption, suspension, etc.; and, we say, by the fundamental and necessary principle, that prescription cannot possibly either begin or continue to run in favor of a party out of possession or against one person without at the same time running in favor of some other person.

Needless to say that the idea of following the letter of said article unbendingly, as if said article stood, alone in our statutory law, is totally inadmissible. That article has to be read in connection with article 3457, which says of prescription that it is:

"A manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law."

Now, what are the conditions, "regulated by law," under which an owner of real estate may lose his title?

To our mind it is utterly and plainly juridical to say that an owner may lose his title without some one else ipso facto eo instanti acquiring it. A title cannot remain up in the air. One party losing his title, and another party acquiring it, or one party acquiring the title and another party losing it, are the necessary converses of each other. It follows from this that when the Code provides the mode, and the sole and exclusive mode, by which one party may acquire title by the prescription of 30 years,

it necessarily, ipso facto, provides the mode, and necessarily the sole and exclusive mode, by which the former owner may lose his title. When, therefore, articles 3499, 3500, and 3501 of the Code provide the exclusive mode in which a party may acquire title by the prescription of 30 years, they necessarily provide the exclusive mode by which a party may lose his title by the prescription of 30 years. Article 3548, which provides that the action for an immovable is prescribed by 30 years, or, in other words, that an owner loses his title by the prescription of 30 years, must therefore necessarily be read in connection with said article 3499 et seq. which provide how a party may acquire title by said prescription. The losing of the title being the mere converse of the acquisition by some one else, the affirmative as to the only mode in which the title may be acquired by prescription of 30 years is pregnant with the affirmative of the only mode in which it may be lost.

But the Code does not leave us to mere inference in this matter, for by article 496, already quoted supra, it provides in express terms how an owner may lose his ownership:

"The owner exposes himself to the loss of his right of ownership if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription."

This, we say, is pregnant with the negative that he cannot lose it unless he leaves it in the possession of a third party.

The contention of defendant adds to this article a provision that the owner loses his ownership by prescription, even though he does not allow any one to remain in the possession of it "a sufficient time to enable the latter to acquire it by prescription."

True, the defendant has not said that the plaintiffs in this case have lost the title, and that the defendant has acquired it; but it

proposes to do what is the exact equivalent of that, to take the property away from the plaintiffs and give it to the defendant. If there is a difference between the two, we do not see it; and we are sure the litigants do not either.

The contention of defendant nullifies, throws into the scrap heap, a jurisprudence long firmly established in this state, and in the modern common law, and, we dare say, wherever title to real estate is allowed to be divested by prescription. It is the jurisprudence usually found under the heading *Tacking of Possessions*.

*"Tacking Possessions of Same Person Temporarily Interrupted.*—Since the constructive possession of the true owner revives when actual possession by the adverse claimant ceases, a renewed adverse possession by him after temporary abandonment cannot be tacked to his prior possession to make out the statutory period. Nor can one adverse holder tack together his own several holdings when he has allowed another person to acquire the intermediate tortuous possession before his own has ripened into title." 1 Cyc. 1009.

"Several successive possessions cannot be tacked for the purpose of showing a continuous adverse possession, where there is no privity of estate or connection of title between the several occupants. Entries of this character, neither of which continues for the limitation period, are merely a series of independent trespasses which cannot ripen into title, because the law restores the possession of the rightful owner on every discontinuance of the possession of one who holds adversely to him." 1 R. C. L. 720.

*"Between Whom Privity Exists.*—Privity denotes merely a succession of relationships to the same thing, whether created by deeds, or by other act, or by operation of law. If one by agreement surrenders his possession to another, and the acts of the parties are such that the two possessions actually connect, the latter commencing at or before the former ends, leaving no interval for the constructive possession of the true owner to intervene, such two possessions are blended into one, and the limitation period upon the right of such owner to reclaim the land is thereby continued; indeed that purpose of continuous possession is the continuous ouster of the owner." 1 R. C. L. 718.

It will suffice for us to quote from one decision by this court (*Sibley v. Pierson*, 125 La. 514, 51 South. 513):

"Defendants, on the other hand, say that the court erred in not according to their mother,

and through her to them, the benefit of the possession of her vendor, their father, and in not, upon that basis, maintaining their plea of the prescription of 30 years. \* \* \* There is no doubt that, where an heir (and the same may be said of a coproprietor, other than an heir) has possessed the whole or part of an estate separately for 30 years, he may successfully oppose a suit for partition. \* \* \* But he must have possessed uninterruptedly and in the same character during the entire period; and where a person, having acquired a particular described tract of land, has taken possession of adjoining tract, or, having acquired a specific interest in a particular tract, has taken possession of the whole, with a view of acquiring the additional tract, or interest, merely by holding possession of it under a claim of ownership, he does not convey such possession to a vendee to whom he sells the tract or interest described, and such vendee cannot, for the purpose of aiding himself in the acquisition by prescription of property not included in his title, add his vendor's possession to his own, there being no privity between him and his vendor in that respect. (Civ. Code, art. 3520; *Prevost v. Johnson*, 9 Mart. (O. S.) 170; *City v. Shakespeare*, 39 La. Ann. 1033, 3 South. 346; *Railway Co. v. Le Rosen*, 52 La. Ann. 204, 26 South. 854; *Jasperson v. Scharnikow*, 15 L. R. A. 1192, 1202 (notes); *A. & E. Enc. of Law* (2d Ed.) vol. 1, pp. 842, 845; Cyc. vol. 1, p. 1007."

The case of *Railway Co. v. Le Rosen*, 52 La. Ann. 204, 26 South. 854, here cited, is a well-known one in our reports. There, a lot in Shreveport had been possessed continuously and uninterruptedly under fence for more than 40 years, the successive possessors not suspecting that a certain part of the lot was not included in the description of the lot as contained in their successive titles. They pleaded in vain the prescription of 30 years. The court held that the possessions of the successive holders could not be tacked, for the reason, as expressed in the *Sibley v. Pierson* decision, *supra*, "there being no privity between him and his vendor in that respect." The law "restored the possession of the rightful owner on every discontinuance of the possession of one who holds adversely to him." 1 R. C. L. *supra*.

This jurisprudence, thus so well established, both in this state and at common law, is entirely inconsistent with the theory of de-



fendant, that for defeating the action of the owner of the property a continuous uninterrupted possession of 30 years is not required.

To our mind, the argument, in a nutshell, stands thus: A party cannot lose his title without at the same time some other party acquiring it. Until a party loses his title, or, which is the same thing, until some other party acquires it, there cannot possibly be any reason for not letting the title be judicially asserted. No one can pretend that ownership can be acquired by the prescription of 30 years without continuous, uninterrupted possession. Hence adverse possession during 30 years is necessary for depriving an owner of his right to assert his title judicially.

The fact is that, if this contention of adverse possession not being necessary for the prescription of an owner's right of action were not being urged seriously, we should not consider it to be serious. For how can prescription against a right of action run so long as there is no adverse party against which the action may be brought; and, moreover, so long as there is no cause or reason whatever why an action should be brought? An owner has a tract of swamp land which nobody is disturbing. If he wanted to bring suit against anybody about the land, he could not, there being no one disturbing the land. This situation of nobody disturbing the land, and of the consequent impossibility of bringing suit, continues for 30 years. On the first day of the thirty-first year some one disturbs the land, and the owner brings suit; and he is told that his right of action is prescribed. To contend a thing of that kind is to lose sight of the fact that before prescription can run against a cause of action the cause of action must exist. Prescription cannot run against a cause of action which does not exist; and a cause of action for the petitory action, or action in revendication does not exist until some party has taken adverse possession.

And this adverse possession must necessarily be continuous and uninterrupted in order that the prescription itself should not be interrupted, and a new course of prescription have to begin, for, by operation of the principle that, in the absence of adverse actual possession possession follows title, the possession of the owner of the title would revive the moment the actual possession ceased, and if actual possession were resumed after this interruption, this new actual possession could not be joined to the actual possession prior to the interruption for making out the sum of the prescriptive period. After every interruption, a new period of possession begins. C. C. art. 3495.

Defendant invokes also the prescription of 30 years provided for by article 1030 of the Code reading:

"The faculty of accepting or renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables."

This prescription is inapplicable to the case, for the reason that the plaintiffs accepted the succession of their ancestor through whom they derive title by inheritance within the 30 years.

But defendant contends that the said acceptance is inapplicable to, or did not cover, this particular property, because this property was not included in the inventory of the succession; that there was no acceptance in so far as this particular piece of property is concerned. Article 986 of the Code reads:

"He who has the power of accepting the entire succession cannot divide and accept only a part."

The plaintiffs had the power of accepting the entire succession of their ancestor, since they were the legal heirs. In attributing to them the acceptance of only a part of the said succession, the defendant supposes their having done something they were without power to do.

By not accepting the succession within 30

years the heir loses his inheritance, and the heir next in rank becomes vested with the right of inheritance; and this happens even though this heir next in rank has not been in possession of the property of which the succession is composed. Defendant points to this as illustrative of the possibility of an owner losing his property by the prescription of 30 years without possession on the part of the person to whom he loses it. The inappropriateness of the illustration lies in the fact that, under the express terms of said article, what is barred by the prescription which it provides is not the right of an owner to recover his property, but, in the words of the article, "the faculty of accepting a succession." Between the two cases there is no analogy whatever. The heir has 30 years within which he may elect to accept, and thereby acquire the property. Pending this 30 years thus running against him the property is not in his possession, either actually or constructively, but in the possession of the representative of the succession; and this representative of the succession does not hold for himself, but for whichever heir may eventually accept the succession, so that when the heir first in rank suffers his faculty to accept to prescribe, and the heir next in rank accepts, the latter heir has in fact possessed through the representative of the succession from the time of the opening of the succession. "The effect of the acceptance goes back to the day of the opening of the succession." C. C. 957. The rationale of said article 1030 is that the public has an interest in not letting the ownership of property remain too long in uncertainty or suspense; and hence a time is fixed

within which the heir must make up his mind whether to accept or renounce, and thereby fix the ownership of the property. How totally inapplicable this is to the case of an owner losing his ownership because he has had no occasion to use it for a certain length of time is perfectly evident. We may add that no article in the French Code or in ours has been found to be more difficult of interpretation than this article 1030. The French writers have evolved no less than eight different systems, or theories, out of it; and the justices of this court, in the Succession of Waters, 12 La. Ann. 97, frankly confessed their inability to solve it. Therefore to invoke it for throwing light upon the proper interpretation of some other article of the Code is simply to seek light out of Cimmerian darkness.

The plaintiffs are Dominique Harang and Mrs. Wid. Eugene F. Meunier, each claiming to own <sup>2280/25920</sup> of one-third undivided of the property in question, a full description of which is given in the judgment appealed from.

The painstaking care with which the learned trial judge has gone into the intricate facts of this case, and the elaborate and lucid opinion he has written, have conduced very much to facilitate the work of the court, and has made unnecessary the going into greater detail than has been done in this opinion. It would have been practically a mere repetition. He found as we do in favor of plaintiffs.

Judgment affirmed.

MONROE, C. J., dissents and reserves right to hand down opinion. See 79 South. 789.

O'NIELL and LECHE, JJ., concur in the decree.

(79 South. 829)

No. 22953.

Succession of LEVITAN et ux.

(June 29, 1918. Rehearing Denied Nov. 4, 1918.)

*(Syllabus by the Court.)***1. EVIDENCE ⇐76—WEIGHT AND SUFFICIENCY—FAILURE TO DENY.**

The testimony of a physician and surgeon, to the effect that he was employed by the mother of his patient, a married woman, rather than by the patient or her husband, and rendered valuable services, for which he considered the mother able to pay, but doubted the ability of the husband so to do, is strongly corroborated by the circumstance that the patient, having succeeded, as sole heir to the estate of her mother, hears the testimony, and does not take the stand to question its verity.

**2. PHYSICIANS AND SURGEONS ⇐23—CHARGES FOR SERVICES—REASONABLENESS.**

It is a matter of common information that physicians and surgeons do not regulate their charges for professional services by any fixed standard of pecuniary value, but, to a certain extent, upon the basis of the ability of the patient to pay, and, on that basis, more frequently than otherwise, perhaps, are but poorly compensated. Where such services are shown to have been of the highest value, in so far as the life and welfare of the patient were concerned, and the charge is neither unreasonable nor inconsiderate, as compared with the financial ability of the employer, it should be allowed by the court.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Provisional account by Mrs. Esther J. Gordon, as executrix and sole heir of her deceased mother, Mina Grodsky, widow of Abraham Levitan, with opposition by Dr. Louis Levy, based upon an account for physician's services. Opposition dismissed, and account approved, and opponent appeals. Judgment annulled, and judgment rendered for opponent, recognizing him as an ordinary creditor of the succession.

Woodville & Woodville, of New Orleans, for appellant. Edgar M. Cahn and Joseph Rosenberg, both of New Orleans, for appellee.

**Statement of the Case.**

MONROE, C. J. Dr. Louis Levy rendered professional services to Mrs. Esther J. Gordon, wife of J. Gordon, and daughter of decedent, from about May 27, 1914, until November or December of that year, during which period he successfully performed a Cæsarian operation upon her. There is no issue here as to the value of the services or the necessity of the operation, in so far as the life and well-being of the patient are concerned; the real question in the case being one of dollars and cents. In July, 1915, the doctor brought suit against Mrs. Levitan and J. Gordon for \$500, alleging that he had been employed by the former and had performed the operation at her request, and that the latter was cognizant of the fact that the services were rendered and of the necessity therefor. The defendants filed exceptions and answers, but the case, for one reason or another (towards the last, because of the illness of Mrs. Levitan), was never brought to trial; and, she having died, on December 6, 1916, it was thereafter discontinued, following which, on February 19, 1917, the plaintiff therein set up the same claim by way of opposition to the provisional account filed by Mrs. Gordon, who is the executrix and sole heir of her deceased mother. It is shown that opponent had been the family physician of Mrs. Levitan and had no acquaintance with Mr. Gordon, but knew that he was a gentleman of very limited means; that Mrs. Levitan brought her daughter to him and requested him to take charge of her; that on November 18 she called him to her house, where her daughter was having convulsions, from kidney trouble; that she was very much excited, and said that she wanted everything done that could be done, and, at her instance, a consultation was had, and the patient was taken to the infirmary, where the operation mentioned was at once performed; that at the infirmary, after the opera-

tion, Mrs. Levitan told opponent to put special nurses on the case, and spare no expense; that opponent was never, at any time, consulted by Mr. Gordon about the case; and that the services were well worth the amount charged. Attention is called to the circumstance that Mrs. Gordon was present in court when the facts thus recapitulated were testified to, and did not take the stand to deny the truth of the testimony. The opposition was dismissed and opponent appealed.

#### Opinion.

[1, 2] We are of opinion that the evidence, uncontradicted as it is, and given under circumstances in which it would have been easy and natural for the person most interested to have contradicted it, if she thought that she could conscientiously do so, sufficiently establishes the employment of the opponent by Mrs. Levitan. It is a matter of common information that physicians and surgeons do not regulate their charges by any fixed standard of pecuniary value, but, to a certain extent, base them on the ability of the patient to pay, and, on that basis, more frequently than otherwise, perhaps, are but poorly compensated. The provisional account filed by Mrs. Gordon shows only the cash collections which came into her hands, up to the date of its filing, amounting to \$9,140.85, against which there are some \$4,000 or \$5,000 of bills, due or paid, from which we infer that the decedent had been engaged in quite an active furniture business. The inventory of the succession property has not, however, been filed in evidence. Considering the case as presented, we find no sufficient reason for holding that the amount demanded by the opponent is unreasonable, or even inconsiderate.

It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment in favor of the opponent, recognizing him as an ordinary creditor of this succession in the sum of \$500, and direct-

ing that he be placed on the account for that amount, with legal interest thereon from November 16, 1914, until paid.

(79 South. 830)

No. 23081.

J. J. STOVALL & SONS, Limited, v.  
HUBIER.

In re HUBIER.

(June 29, 1918. Rehearing Denied Nov. 4, 1918.)

#### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR $\S$ 195, 544(1) — DISMISSAL OF SUPPLEMENTAL PETITION — REVIEW.

A supplemental petition, which has been dismissed on an exception of want of jurisdiction filed by the defendant, is not subject to review and consideration by the appellate court, where no objection was made to the ruling of the district court thereon, or a bill of exceptions reserved thereto. It passed out of the case when it was dismissed.

#### 2. VENUE $\S$ 5(1) — JURISDICTION OF DISTRICT COURT — PROPERTY IN OTHER PARISH.

The district court is without jurisdiction in a proceeding in rem against the property of a citizen domiciled in an adjoining parish, unless, under article 163 of the Code of Practice, as amended by Act No. 64 of 1876, the plaintiff has a right to a writ of sequestration or provisional seizure.

Certiorari or Review to Court of Appeal, Parish of Lincoln.

Suit in rem by J. J. Stovall & Sons, Limited, against R. F. Hubier, with writ of sequestration, under which defendant's property was seized, and in which defendant claimed a money judgment against plaintiff. There was judgment for damages for defendant on ground that plaintiff had no privilege upon property sequestered, and from a judgment of the Court of Appeal, on appeal by plaintiff against defendant's claim of privilege and against personalty, he applies for certiorari or writ of review. Judgments reversed, and suit dismissed, reserving to defend-

ant the right to claim damages for the unlawful seizure of his property.

W. J. Hammon, of Jonesboro, and R. A. Fraser, of Many, for applicant. John H. Mathews, of Alexandria, for respondent.

SOMMERVILLE, J. This is a proceeding in rem by plaintiff, domiciled in Winn parish, against R. F. Hubier, defendant, a resident of Sabine parish, wherein certain movable property of defendant in Jackson parish was sequestered by plaintiff, who claimed a privilege thereon.

The action was not a personal one against defendant. The plaintiff prayed that the sheriff of Jackson parish seize and sequester all of the movable property belonging to R. F. Hubier in Jackson parish, and, on final trial, that petitioner's privilege be recognized and enforced on said property, and that it have judgment in the sum of \$821.13 against the property sequestered; that the property be sold, and the proceeds applied to the payment of petitioner's claim. Defendant excepted to the jurisdiction of the court, which exception was overruled. The exception should have been sustained because the facts alleged in the petition showed that the plaintiff had not a lien on the mules sequestered. Defendant answered, reserving the benefit of the exceptions filed, denying the existence of the privilege claimed by plaintiff in its petition, and, reconvening, claimed damages for the wrongful issuance of the writ of sequestration.

Defendant was served with a copy of the petition, and he was cited in Sabine parish to answer: but no judgment was asked for against him. The plaintiff rests his claim in the district court in Jackson parish upon article 163, C. P., as amended by Act No. 64, 1876, p. 106, which provides:

"In all cases of provisional seizure or sequestration, the defendant may be cited, whether in the first instance or in appeal either within the

jurisdiction where the property \* \* \* provisionally seized or sequestered is situated or found, though he has his domicile or residence out of that jurisdiction, or in that where the defendant has his domicile, as the plaintiff chooses; provided, that all judgments rendered in such cases shall only be operative up to the value of the property proceeded against, and not binding for any excess over the value of the property in personam against the defendant."

Thereupon plaintiff filed what it termed an "amended and supplemental petition," in which it set forth an entirely new and different cause of action. It alleged that defendant by filing a reconventional demand had submitted to the jurisdiction of the court in Jackson parish. It alleged that defendant had mortgaged, assigned, and disposed of part of his property, and was about to mortgage, assign, and dispose of his property, rights, and credits, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them. It prayed for and obtained a writ of attachment under which defendant's property was seized. It also asked for a personal judgment against defendant, and that the writ of attachment therein sued out be sustained, and that petitioner's lien and privilege on the property attacked resulting from the attachment be recognized and enforced, etc.

The writ of sequestration was not referred to in the petition last filed. Citation in this last suit asking for a judgment in personam and for an attachment was served upon defendant in person in Sabine parish.

Defendant excepted to the supplemental petition on the ground of want of jurisdiction. This exception was sustained, and the supplemental petition was dismissed. It passed out of the case. Plaintiff did not object to the ruling of the court dismissing its supplemental petition, and it did not reserve a bill of exceptions thereto. It submitted to the ruling, and the case was proceeded with regularly thereafter without reference to the supplemental petition. No

default was taken on the supplemental petition; it was not put at issue by answer; and no evidence was offered in support thereof. It never went to trial.

There was judgment in the district court in favor of defendant dissolving the writ of sequestration on the ground that plaintiff was without a privilege upon the property sequestered and for damages. Plaintiff appealed to the Court of Appeal, which court held that plaintiff had no privilege on the property of defendant, and that the writ of sequestration had been properly set aside; but, proceeding upon the theory that defendant waived objection to the jurisdiction of the court of Jackson parish when he filed a reconventional demand, the court rendered a personal judgment against defendant for the amount claimed in the attachment suit.

[1, 2] Defendant represents that the Court of Appeal erred in considering the supplemental petition of plaintiff, asking for an attachment of his property and for a personal judgment against him, which had been formally dismissed by the district court, and in rendering judgment upon said petition in favor of plaintiff. He now asks:

"That, upon due hearing, said personal judgment against relator be annulled and set aside, and the judgment of the district court be affirmed and made the judgment of this court."

There was no claim by plaintiff before the Court of Appeal for a personal judgment against defendant, even if defendant had acquiesced in the jurisdiction of the court of Jackson parish. The supplemental petition making that claim had been formally dismissed; no appeal had been taken from that order of dismissal; there had been no trial of that petition; and there was no suit pending for a judgment in personam.

The original petition did not ask for a personal judgment against defendant.

It was error on the part of the Court of Appeal to consider the supplemental petition

and to render a personal judgment against defendant.

It was error in the district court to have overruled the plea of defendant to the jurisdiction of the court; and that ruling will be reversed, and the suits dismissed.

It is therefore ordered, adjudged, and decreed that the judgments of the Court of Appeal and of the district court herein be reversed and set aside, and this suit be dismissed, reserving to defendant the right to claim damages for the unlawful seizure of his property in this case; all at the cost of plaintiff.

(79 South. 832)

No. 23166.

GEORGE v. GEORGE et al.

In re GEORGE.

(June 29, 1918. Rehearing Denied Nov. 4, 1918.)

*(Syllabus by the Court.)*

1. DIVORCE  $\S$ 63—SEPARATION FROM BED AND BOARD—MARRIED WOMAN'S SEPARATE DOMICILE—MATRIMONIAL DOMICILE—JURISDICTION.

A married woman may lawfully acquire a separate domicile, when the misconduct of her husband compels her to leave him, or when he abandons her; and, when she does so, there is no longer a matrimonial domicile, the courts of which possess exclusive jurisdiction of the res, or marital status, but the courts of the domiciles established by the parties, respectively, are vested with such jurisdiction.

2. DOMICILE  $\S$ 4(1)—CONTINUANCE.

Unless otherwise provided by law, a domicile once established is retained until another is acquired.

*(Additional Syllabus by Editorial Staff.)*

3. DIVORCE  $\S$ 124—SEPARATION FROM BED AND BOARD—JURISDICTION—DOMICILE OF PARTIES—EVIDENCE.

In a wife's action for divorce, etc., evidence held to sustain the trial court's finding that defendant, who excepted to jurisdiction, had not shown his acquisition of a domicile elsewhere than in the city of New Orleans.

Suit for divorce by Mrs. Mae E. George against Charles E. George and another. Ex-

ceptions to jurisdiction and to want of parties overruled, and named defendant applies for certiorari and prohibition. Application denied, and proceeding dismissed.

J. B. Rosser, Jr., of New Orleans, for applicant. R. H. Marr, of New Orleans, for respondent.

MONROE, C. J. It appears from the application and returns herein that, in May, 1917, relator brought, in the civil district court, the suit under the title of which this proceeding is taken, alleging, in substance, that in 1898 she was married, in Chicago, to the defendant C. E. George, and that the marriage has never been dissolved; that on November 6, 1912, defendant, nevertheless, in Milwaukee, Wis., married one Selma Klein, and has lived with her since that time; that he is now, and for a number of years has been, a resident of this city; and that petitioner is entitled to a judgment decreeing null his bigamous marriage and divorcing him from petitioner. Wherefore, she prays for citation of said George and Klein and for judgment as thus indicated. Defendant George was cited personally, and on June 27, 1917, filed an exception to the jurisdiction of the court, averring, by way of specification:

"That, according to paragraph 1 of plaintiff's petition herein, she alleges that, on November 1, 1898, she was married, at the city of Chicago, Ill., to your exceptor, and, accordingly, this being an action for divorce, and the matrimonial domicile being, as alleged, in the city of Chicago, Ill., this honorable court has no jurisdiction, *ratione materiæ* nor *ratione personæ*, to try and determine this cause."

On October 19, 1917, he filed another exception, alleging that Selma Klein is a necessary party to the suit and has not been cited; and, "with full reservation of his plea to the jurisdiction," filed a plea of *lis pendens*, based upon the pendency of a suit in New York. Thereafter, a supplemental petition was filed, alleging that the defendant Klein was in New Orleans when the suit was

instituted, but had subsequently left the state, and praying that a curator ad hoc be appointed to represent her, which was done; but the appointment was subsequently revoked (thereby practically eliminating her from the case), the exceptions were then overruled, and the defendant George presented to this court the application for certiorari and prohibition that we are now considering.

[1] The learned counsel for defendant seems to base his attack on the jurisdiction of the Louisiana court upon the theory that the matrimonial domicile is necessarily and permanently established, by the marriage, at the place of the marriage; that the *res*, or matrimonial status, is an inseparable unit, the situs of which is the matrimonial domicile; and that only the court within the territorial jurisdiction of which the *res* is found can exercise jurisdiction with respect to it. But that theory is not sustained by the authorities. A marriage in a particular place, merely of itself, no more establishes a matrimonial domicile there than it establishes personal domiciles for the individuals who enter into the marital relation. The *res*, or marital status, does not always remain a unit—far from it. And the courts of the different states have, each, jurisdiction to determine the marital status of all persons lawfully domiciled within their borders. Primarily, the domicile of the wife follows that of the husband, and the domicile of the husband is, therefore the matrimonial domicile, from the beginning of the marriage until, for some reason which the law recognizes, it ceases to be so.

"The exception" (to the rule that a married woman has no other domicile, and can acquire no other, than that of her husband) "arises whenever it becomes necessary and proper that the wife should acquire a separate domicile, as, when the misconduct of the husband compels her to leave him, or, when he abandons her." *Stevens v. Allen*, 139 La. 663, 71 South. 936, L. R. A. 1916E, 1116.

In the instant case, the defendant George, as we understand the situation, admits that

he and plaintiff lived together as husband and wife, but alleges that she refused to marry him, and further admits that at present he and the defendant Klein are living together as husband and wife, and alleges that they are lawfully married, and whether that is true, or otherwise is to be determined in the pending suit; but, whether true or false, it is evidently necessary and proper that plaintiff should have a separate domicile, and, it being shown that she has, it follows that, as between her and George, there is no matrimonial domicile, and that the court in which he has his domicile is vested with jurisdiction of any suit affecting their common marital status that she may bring against him, so that, if he was domiciled in New Orleans, when cited herein, the pending suit was properly brought, and, upon the other hand, if she was domiciled in New York, when he was cited in the suit there pending, it may very well be held that that suit was also properly brought.

[2, 3] Upon the question of his domicile, defendant is shown to have made an affidavit, on April 19, 1916, for the purposes of the jurisdiction of the New York court, which reads, in part:

" \* \* \* Charles E. George, who, being duly sworn, deposes and says that he is a citizen of the state of Louisiana and domiciled in the city of New Orleans and doing business therein; \* \* \* that, at the time when service of process in this cause upon defendant was made, he was then, and had been for three years previously, a citizen of this state" (the affidavit having been made in New Orleans) "and domiciled in the city of New Orleans, \* \* \* and the service of said process was made upon him while he was temporarily sojourning in New York," etc.

On the trial of the exception in this case, defendant testified that, when served with process herein, he was temporarily sojourning in New Orleans, but there is other evidence on that subject (including a letter, written at New Orleans on the day preceding that upon which the service of process in question was made) considering which, we

conclude, with the trial judge, that defendant has not shown that he has acquired a domicile elsewhere since he made affidavit that he was domiciled here; and, unless it is otherwise provided by law, a domicile once established is retained until another is acquired.

It is therefore ordered that relator's application be denied, and this proceeding dismissed, at his cost.

(79 South. 833)

No. 23047.

EMPIRE RICE MILLING CO. et al. v.  
RAILROAD COMMISSION OF  
LOUISIANA.

(June 29, 1918. Rehearing Denied Nov. 4, 1918.)

(Syllabus by the Court.)

1. CARRIERS  $\S$  10—RAILROAD COMMISSION—  
CREATION AND POWERS.

The Railroad Commission of Louisiana is established in the Constitution of the state; and to it is given certain powers and authority over railroads, steamboats, water craft, sleeping car, freight, and passenger tariffs and service, express rates, telephone and telegraph charges, etc.

2. CARRIERS  $\S$  18(1)—ORDERS OF RAILROAD  
COMMISSION—COMPLAINT—JURISDICTION OF  
COURTS.

On the complaint of a party in interest that any rate, classification, rule, charge, order, act, or regulation adopted by the commission is beyond the power of the commission, or is unreasonable, discriminatory, extortionate, or unjust, the courts of the state have jurisdiction to entertain the complaint.

3. CARRIERS  $\S$  18(1)—MILLING IN TRANSIT—  
RULE OF RAILROAD COMMISSION—CONTEST.

Milling in transit is a burden placed upon the railroads, and the validity of such a rule may be contested by the railroads.

4. CARRIERS  $\S$  11—MILLING IN TRANSIT—  
COMPENSATORY RATES.

Milling in transit is not an unusual privilege granted by railroads to their patrons, and it is not unusual or unjust to impose such an obligation upon railroads; provided that the rates are compensatory for the additional burden placed upon them.



5. CARRIERS ~~vs~~ 18(1)—MILLING IN TRANSIT—OBLIGATION OF RAILROAD—CONTEST.

The obligation of milling in transit cannot be contested by any other person than the railroads upon which it is placed.

(Additional Syllabus by Editorial Staff.)

6. CARRIERS ~~vs~~ 18(3)—ORDERS OF RAILROAD COMMISSION—VALIDITY—PRESUMPTION AND BURDEN OF PROOF.

The presumption is that Railroad Commission acted justly as to all parties concerned in adopting a milling in transit and a rate order, and courts will not interfere without clear evidence that a party's legal rights have been invaded, or that rate is unreasonable, discriminatory, or extortionate.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Suit by the Empire Rice Milling Company and others against the Railroad Commission of Louisiana to set aside an order of the commission, with intervention by the Lake Charles Milling Company and by the Southern Rice Growers' Association and others. Judgment for defendant and for interveners, and plaintiffs appeal. Affirmed.

Arthur A. Moreno, of New Orleans, for appellants. W. M. Barrow, Asst. Atty. Gen., for appellee Railroad Commission of Louisiana. McCoy & Moss, of Lake Charles, for appellee Lake Charles Rice Milling Co. Medlenka & Bruner, of Crowley, for appellees Southern Rice Growers' Ass'n and others.

SOMMERVILLE, J. The plaintiffs, thirteen in number, are the New Orleans Joint Traffic Bureau of the New Orleans Board of Trade, Limited, six rice mills, and six rice merchants and commercial firms, all located in New Orleans. They allege that they are buyers, sellers, and millers of rice; that they are "parties in interest" in and to order No. 2116 adopted by the Railroad Commission of Louisiana; that order No. 2116 establishes tariffs on dressed and rough rice which are increases in rates over those prevailing at the time of the adoption of said order; that

defendant has also ordered the railroads to establish the privilege of milling rice in transit on all of the roads throughout the state; that the imposition of this burden upon the railroads was the cause of the increase in the tariffs on cleaned and rough rice to be paid by plaintiffs; and that such increase in rates, due to milling in transit, is unreasonable, unjust, discriminatory, and extortionate when applied to the shipments of rice made by them. They pray:

"That there be judgment in favor of petitioners and against the said Railroad Commission of Louisiana avoiding, annulling, and canceling the said order No. 2116."

The defendant commission answered that milling in transit was an ordinary rule and regulation of and for railroad companies and of railroad commissions; that the tariffs on rice established by it were in every way reasonable and just; and that the fixing of rates and the establishing of rules and regulations for the government of railroads were entirely within the power and authority granted it in article 284 of the Constitution.

The Southern Rice Growers' Association, a Texas corporation, domiciled in the county of Jefferson, state of Texas, and largely composed of rice producers of the states of Louisiana, Texas, and Arkansas, together with seven rice growers of Acadia parish, intervened in the suit, and joined defendant in support of the validity and regularity of order No. 2116.

A second petition of intervention was filed by the Lake Charles Rice Milling Company of Louisiana, which also joined the defendant.

There was judgment in favor of the defendant and interveners, and plaintiffs have appealed.

The contest presented in this suit appears to be between the rice millers and merchants of New Orleans, and the rice producers and one or two independent rice millers outside of the city of New Orleans.

It is said there are thirty-one rice mills in the state; but only seven or eight have made themselves parties to this suit. It may be that the others are not interested in order No. 2116. Some of them may be simply rice mills which receive rice for milling, and do not pay the shipping rates. They are the consignees, while the producers are the consignors, and the latter pay the freight. The producers, or rice growers, are asking that the tariffs be maintained. Or, it may be some of the out of town mills receive much of the rough rice which they may have purchased in wagons and barges, which is therefore not affected by the tariffs fixed for railroads. Or, as buyers of rough rice which is received by them over a railroad, they get the benefit of the milling in transit; and therefore they have no cause for complaint against the established rules and rates.

It does not appear how the New Orleans Joint Traffic Bureau of the New Orleans Board of Trade, Limited, is a person interested in the rates paid by the shippers of rice. The rice mills of New Orleans, simply as millers of rice, and not as owners and shippers, would not be interested in the freight rates either; but they, together with the other plaintiffs, allege that they are buyers and sellers of rice, and, as owners and shippers, they are required to pay the increased freight rates on rough rice; and they are therefore injured by the adoption of the milling in transit rule, and the increase in the tariff.

Order 2116 is really in two parts, with the two parts depending upon one another. It orders the railroads to grant the privilege of milling rice in transit; and it increases the tariffs on rice, because of the increased burden of milling in transit placed on the railroads. That is just, and not unjust. It is fair, and not discriminatory. It is, in the opinion of the commission, for the good of the public; and, on its face, order 2116 is valid.

It results from the contentions and concessions of the respective parties that the controversy is reduced to a single issue: What was the nature and character of the order made by the commission? What, in substance, was the power which the commission exercised in making the order?

Plaintiffs on their brief say:

"The issue herein is not as to the correctness of an order of an administrative body, but as to the power of the Railroad Commission to make it, and from this viewpoint the facts upon which the order rests become immaterial."

They also say:

"The mass of testimony in the record is almost appalling and would have entailed a large amount of work on the court, but fortunately the brief of interveners tenders an issue of law rather than fact, obviating the need of reading all this testimony. An examination of the purpose of the order under attack, as found within the order itself, also shows that the issue here is not the correctness of an order of an administrative body, but the power of that body to make the order. Order 2116 of the Railroad Commission compelled the carriers to grant milling in transit and raised the rates through the whole field of rice transportation. \* \* \* That it is not claimed for the order (by defendant) that its rates are the measure of the services, but its virtue lies in the fact that it equalizes the cost of transportation between millers, irrespective of the value of the transportation each demands. The purpose of the order admittedly is to foster competition and increase the selling price of rice. The defense of order 2116 has rested on no other foundation, and, therefore, in the clear light of this frank statement of the purpose of the order the whole voluminous record of facts disappears, and the question resolves itself, not into a question of the expediency of the order from a transportation standpoint, but a question of the power of the Railroad Commission to make an order that has as its end the regulation of market conditions. Because there is only a question of law involved, it is not even necessary to read the voluminous transcripts."

[1] The State Railroad Commission is an administrative body, as was decided in the case of *Morgan's Louisiana & T. R. R. & S. S. Co. v. Railroad Commission*, 109 La. 247, 33 South. 214. It was further said in that case:

"It is a matter not debatable that the state, subject to certain limitations, has, in further-

ance of its object of advancing the public good, a power of regulation and control over the action and conduct of those to whom she has granted these rights and franchises. From the very nature of things, there must arise from time to time differences between the corporation, seeking to derive from its corporate rights the utmost personal advantage it can, and the state, seeking to obtain through its conduct and action the greatest good possible for the public. These differences may arise at any time between them upon matters of detail or administration more or less important. As it would be manifestly impossible to anticipate what these causes would be, or when they would arise, different states have found it necessary to constitute a body charged, as their representative, with the duty of guarding the public interests upon this particular subject, to which they have expressly given very broad authority and powers. \* \* \*

"The power, authority, and duty of the latter are not limited merely to matters affecting the public safety or the public health. They extend also to matters concerning public comfort and public convenience, and in the consideration of matters of comfort and convenience the number of persons who may be concerned or interested in some particular matter at some particular point enter as important factors in determining what is proper to be done. \* \* \* As a matter of course, the commission could not, even under expressly delegated powers, act arbitrarily, in manner such as to trench upon the rights of corporations secured to them by law; but, within certain limits, though their action and orders are all subject to review, they are not all subject to reversal. \* \* \* When such a point in the business of the road is reached, the rights of the 'general public' come clearly into view, and it is not for the railroad, but for the commission, to determine how, in what way, and in what place this money is to be expended so as best to subserve their interest. That is a matter submitted to the judgment of the commission, not that of the railroad or of this court, unless the selection trenches upon the legal rights of the railroad corporation. The mere reference of disputed issues between the parties to this court for adjudication was not intended to constitute it an 'administrative' board, revisory in character over the orders and conclusions of the commission. Our action is judicial, not administrative. It was not intended that we should substitute our judgment for that of the commission every time there is a dispute touching the particular place on the line of railroad where it would be best for the public interest that a station or depot should be placed. To come successfully before this court, the appellant must be able to point out some legal right of its own which has been infringed upon. \* \* \*

"A statute or order of railroad commissioners establishing a station or fixing rates of transportation is not to be interfered with, except upon clear and satisfactory evidence, showing that it is unjust and unreasonable."

[2] Plaintiffs concede that the order of the commission complained of is not open to attack in the courts so long as that body has kept within the powers conferred by law. But, they argue, that the order was not the exercise of such authority, but was based upon the assumption of a power not conferred by law; and they quote from the finding of the commission that it took into consideration, in connection with the petition of the rice growers to have the railroads return to the principle of milling rice in transit, the necessity for such a rule in order to give the rice growers of the state a larger field in which to sell their product. Such argument would have force coming from the railroads, if the commission had added an additional burden upon them without providing for reasonable compensation for the additional service. But, in providing for milling in transit, and, at the same time, raising the tariffs, the commission has acted justly towards the railroads, and with full consideration of their legal rights; and the railroads are not complaining.

In raising the rates to be paid by the shippers, the commission has not invaded any legal right of plaintiffs, who are shippers.

The nature and character of the order of the commission was to obtain from the railroads the greatest good for the public, or that portion of the public composed of rice growers and of rice millers who are near the rice fields. That was within the power delegated to it. It acted upon a matter of public convenience; and the administration of its affairs, or the details thereof, will not be interfered with by the courts, where legal rights have not been invaded. The convenience of rice growers was an important factor in determining that railroads should grant to shippers of rice the privilege of milling in transit. And, in considering and determining the matter, the commission has not interfered with any legal right of plaintiffs.

[3-5] Milling in transit has long been a privilege accorded the producers of agricultural products in this and in other states. It has been established by railroads and by railroad commissions. The privilege is given to shippers of corn and other cereals, and it has been stated that the lumber industry of the state could not exist without it. So, in ordering that rice might be milled in transit it would seem that the commission did not act arbitrarily, or in an unreasonable way.

The rice milling privilege as established by the commission is general in its terms and application. It may be availed of by every one shipping rough rice. It may be availed of by the plaintiffs in this case, if, instead of shipping rough rice to the mills in New Orleans, they would ship to the nearer mills from the places where they buy rice, and have it milled there. But plaintiffs, apparently, prefer to do their own milling. That is, of course, their privilege, which order 2116 does not take away from them. It is doubtless of great advantage to establish rice mills in New Orleans, which city is the primary rice market of the country; and these advantages must be taken together with the disadvantages of being far removed from the rice fields, or points where plaintiffs buy rough rice. It is also their privilege to have their rice milled nearer to points of production, and receive the benefits of milling in transit.

It appears in the record that the commission, before it adopted order 2116, had the railroads, producers, shippers, merchants, and rice millers before them and earnestly and diligently inquired into the matter of tariffs on rice and the milling of rice in transit, etc. They deliberately came to the conclusion that the shippers of rice should have the privi-

lege of milling rice in transit, and that the tariffs on cleaned and rough rice should be increased.

[8] The presumption is that the commission has acted with justice to all parties concerned in adopting order 2116; and the courts will not undertake to interfere with the commission in the absence of clear evidence that the plaintiff's legal rights have been invaded, or that the rates fixed are unreasonable, unjust, discriminatory, or extortionate. The evidence offered by plaintiffs has no such tendency.

Besides, the railroads are the parties most interested in the reduction of the tariffs involved, and they are not parties to the suit. They would be entitled to a hearing in court before their legal rights were taken from them.

The Constitution confers upon the Railroad Commission, and not upon the courts, the power and authority:

"To make reasonable and just rates, charges and regulations, to govern and regulate railroads \* \* \* freight and passenger tariffs and service, \* \* \* to correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on the different railroads, \* \* \* and to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or messages, for a shorter than a longer distance over the same line, unless authorized by the commission to do so in special cases."

The plaintiffs have not introduced evidence sufficient to show that the railroad commission has acted unreasonably, or unjustly, or without authority, in providing for the milling of rice in transit on the various railroads throughout the state; or that it has acted arbitrarily in fixing the tariffs on rice transported with the state. They have not shown that their legal rights have been interfered with.

The judgment appealed from is affirmed.

(79 South. 855)

No. 21278.

VICTOR CORNILLE & DE BLONDE et al.  
v. R. G. DUN & CO.(June 29, 1918. Rehearing Denied Nov. 4,  
1918.)*(Syllabus by Editorial Staff.)***PARTNERSHIP  $\Leftrightarrow$  204—PROCESS.**

Code Prac. art. 198, applies to ordinary partnerships as well as commercial partnerships, so that service of citation, as therein prescribed, "on any of the partners in person, or, at their store or counting house, by delivery to their clerk or agent," is sufficient to support judgment against an ordinary partnership.

Monroe, C. J., and Leche, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by Victor Cornille & De Blonde and others against R. G. Dun & Co. Defendant's exception to the mode of service of citation sustained, and plaintiffs appeal. Judgment annulled, and case remanded to civil district court, to be proceeded with according to law.

Lazarus, Michel & Lazarus and David Sessler, all of New Orleans, for appellants. Richard B. Montgomery, of New Orleans, for appellee.

O'NIELL, J. The only question presented for decision is whether the method provided by article 198 of the Code of Practice, for service of citation "on any commercial association trading under a title or as a firm," applies to an ordinary partnership, i. e., a partnership of which the members are liable only jointly.

The suit is for damages for injury alleged to have been done by defendant to plaintiffs' commercial standing and credit, by an alleged publication and circulation of reports said to be false and libelous.

The plaintiffs alleged in their petition that the defendant, R. G. Dun & Co., was a commercial firm, composed of several persons

whose names were unknown to petitioners, and domiciled and doing business in the parish of Orleans, state of Louisiana. The prayer of the petition was for service upon and judgment against the commercial firm of R. G. Dun & Co. There was no demand for service upon or judgment against any individual member of the firm.

The citation was addressed: "To the commercial firm of R. G. Dun & Company, New Orleans." Service was made by delivering a copy of the citation and petition into the hands of a clerk in the employ of the defendant, in the company's office in New Orleans; all of the members of the firm being then absent. The sheriff's return is in due form, and its recitals are not disputed.

The defendant excepted to the mode of service of citation, and to the jurisdiction of the court, on the following grounds, viz.:

(1) That the defendant was not domiciled in New Orleans, but in New York City, to the knowledge of the plaintiffs, and that none of the members of the firm were residents of, or were actually in, the state of Louisiana.

(2) That the defendant was not a commercial firm, but an ordinary partnership; and that service of citation on a clerk in the firm's office was not according to law and was invalid.

(3) That the service of citation was not made upon a person alleged in the petition to be a duly authorized agent of R. G. Dun & Co., as required by the Code of Practice.

(4) That there had not been a legal service of citation upon any duly authorized agent, nor service upon any person authorized to be served, under the laws of this state.

On trial of the exceptions, the defendant proved by the testimony of the clerk, in whose hands the copy of the citation and petition had been left, that he did not accept service or acknowledge its validity, nor pretend to have authority to represent the firm

in the matter of service of citations, when the papers were served upon him. He acknowledged that he was, and had been continuously for 17 years, a clerk in the defendant's employ, in the New Orleans office, in which the company conducted its business in this district. The defendant then proved, by the testimony of the district manager, that the company's home office was in New York City; that the firm was composed of three members, residing, respectively, in New Jersey, New York, and Maryland; that the business of the firm consisted in procuring and furnishing to its subscribers information regarding the financial standing, credit rating, etc., of traders and business establishments generally; and that the firm also conducted a collection agency, collecting bad debts, but was not engaged in buying or selling goods or property of any kind. It was shown, by the testimony of the district manager, that the defendant had maintained the same office in New Orleans for more than 30 years, paying a license to the city and to the state for the business conducted there.

The plaintiff then introduced in evidence, in connection with the cross-examination of the district manager, the petitions in three suits in which R. G. Dun & Co. had obtained judgments by default against other and different parties, in the city court of New Orleans; which suits were filed, respectively, seven, four, and three months prior to the institution of the present suit. The purpose of the evidence was to prove that R. G. Dun & Co. was a commercial firm doing business in New Orleans, and had judicially acknowledged that fact. The petition in each of the three suits in the city court declared that it was the petition of R. G. Dun & Co., a commercial partnership, domiciled and doing business in the city of New York, state of New York, and also doing business in the city of New Orleans, state of Louisiana.

On re-examination of the district manager, the defendant proved that the allegation, in

each of the previous suits, that R. G. Dun & Co. was a commercial partnership, was made by the attorneys for the company without authority from the manager, who did not know the difference between a commercial and an ordinary partnership. The evidence was promptly objected to by plaintiff's attorney, on the ground that the defendant was estopped and forbidden to deny the judicial declaration that the firm was a commercial partnership, especially without having alleged that the declaration was made in error. The objection was overruled, and a bill of exceptions was reserved and is urged in this appeal.

The district court held that the defendant was only an ordinary partnership, not a commercial partnership, and that the only legal or effective method of serving citation upon an ordinary partnership was by service upon each and every member of the firm, in person. The ruling of the court was that the service of citation in this case had no effect, that the defendant was dispensed and relieved from answering the suit until legally cited, and that no other exception was passed upon. From that ruling, the plaintiffs prosecute this appeal.

#### Opinion.

It is conceded by the defendant that, as the district court did not decide or consider the plea to the jurisdiction, we are not now called upon to decide whether the court has jurisdiction to render a judgment against the defendant partnership in this suit, if the service of citation is legal. In other words, the question whether the firm or partnership styled R. G. Dun & Co., doing business in New Orleans, is within the jurisdiction of the civil district court, is not now before us for decision.

Assuming, merely for the purpose of this decision, that the defendant partnership is subject to the process of the civil district court, the question is whether the partner-

ship has been legally cited. And, in our opinion, that question does not depend upon whether the defendant is a commercial partnership or only an ordinary partnership; that is to say, whether it is a partnership for whose debts the members are liable in solido, or a partnership for whose debts the members are liable only jointly. Hence we deem it unnecessary to decide now whether the defendant is judicially estopped or bound by the declaration, made in the other suits, that the firm was a commercial partnership.

Article 198 of the Code of Practice purports to provide a method or process for serving citation upon any and every character of juridical or fictitious being, or association of persons. It declares that, when a suit is brought against a corporation, a public institution, or against "persons associated in ordinary partnership," the service must be made as follows: Then follows, each in a separate paragraph, the method of service of a citation addressed to: First a municipal or other political corporation; second, a banking institution; third, other civil corporations, religious corporations or public institutions; and, fourth, partnerships or firms, viz.:

"In suits against any commercial association trading under a title or as a firm, on any of the partners in person, or at their store or counting house, by delivery to their clerk or agent."

The argument of the learned counsel for the defendant is that the expression, "commercial association trading under a title or as a firm," means only a "commercial partnership," in the technical sense in which articles 2824 and 2872 of the Civil Code distinguish "commercial" from "ordinary" partnerships; the members of the former class of partnerships being liable in solido, and the members of the latter class being liable only jointly, for the debts of the partnership. The argument ignores the expression, "ordinary

partnership," used in the opening paragraph of the article in question, declaring or defining the classes of associations to which the subsequent paragraphs apply.

Eliminating what does not apply to a partnership or firm, article 198 of the Code of Practice would read thus:

"When a suit is brought against \* \* \* persons associated in ordinary partnership, \* \* \* i. e. against any commercial association trading under a title or as a firm, \* \* \* the service must be made \* \* \* on any of the partners in person, or at their store or counting house, by delivery to their clerk or agent."

In other words, in a suit against either kind of partnership, that is, against an "ordinary partnership" or "against any commercial association trading under a title or as a firm," if the citation be served upon one of the members in person, the service may be made wherever he is found; but, if it be served upon a clerk or agent of the firm or partnership, the service must be made at the office, store, or counting house of the firm or partnership.

Article 182 of the Code of Practice provides that, if the defendants in a suit are members of the same firm, it will be sufficient to deliver a copy of the petition and citation to the person representing the defendants. The article has been construed not to permit a personal judgment to be rendered against an individual member of an ordinary partnership by service of citation upon his copartner. See *Stevenson v. Riser*, 23 La. Ann. 421. But there is no reason to doubt that service of citation upon one member of the firm is sufficient for obtaining a judgment against a partnership, whether commercial or ordinary.

If the judgment of the district court is correct, the Code of Practice does not contain any provision whatever for service of citation in a suit against an ordinary partnership. We cannot believe that the framers of articles 182 and 198 of the Code of Practice were guilty of such negligence, especially as

the conclusion would have nothing to rest upon except the supposition that the term, "any commercial association trading under a title or as a firm," is used in the technical sense of "commercial partnership," and that the term "ordinary partnership," in the first paragraph of the article, also means a commercial partnership, technically, not an "ordinary" partnership at all.

It must be borne in mind that the plaintiffs are not suing the individual members of this partnership, or seeking to enforce a personal obligation resulting from their membership in the partnership, or to obtain a judgment that would authorize a seizure of the personal property of a member of the partnership. The suit is only against the partnership itself, for a judgment that could be satisfied only by seizure of property belonging to the partnership.

Article 2823 of the Civil Code, among the general provisions relating to ordinary as well as commercial partnerships, declares that the property belonging to a partnership is liable for the partnership debts in preference to the debts of an individual member of the partnership. And that is a clear recognition of the distinction between a judgment against a partnership—even an ordinary partnership—and a judgment against a member of the partnership on the obligation resulting merely from his membership in the partnership. On that subject, see *Succeſſion of Pilcher*, 39 La. Ann. 362, 1 South. 929, cited with approval in *Wolf v. New Orleans Tailor-Made Pants Co.*, 52 La. Ann. 1365, 27 South. 893; in *Newman v. Eldridge*, 107 La. 320, 31 South. 688; and in *Stothart v. William T. Hardie & Co.*, 110 La. 700, 34 South. 740.

If we should hold that article 198 of the Code of Practice does not apply to an ordinary partnership, a judgment could not be obtained against that kind of partnership

even by service of citation on one of its members in person. Service would have to be made upon each and every member in person, the same as if there were no partnership at all; the same formality would have to be observed as if judgment were demanded against each member individually; and, if any member should be a nonresident or could not be found, a suit could not be maintained against the partnership at all.

The learned counsel for defendant relies upon the decision in *Le Blanc v. Marsoudet*, 25 La. Ann. 464, and the decision in *Alkman v. Sanderson & Porter*, 122 La. 265, 47 South. 600, to support the ruling that an ordinary partnership cannot be cited except by personal service of citation upon each and every member of the firm. But neither of those decisions goes that far. In the first case, the ruling was merely that judgment could not legally be rendered against the individual members of an ordinary partnership, by citation addressed only to the firm and served at an elected domicile of the partners. In the other case cited, the question was of jurisdiction of our state courts over a nonresident firm and of the nonresident members of the firm. The ruling was that the civil district court for the parish of Orleans could not subject to its jurisdiction the nonresident members of the partnership nor the partnership itself that had no domicile here. The sheriff's return on the citation in that case did not show any service at all, viz. "by leaving the same at their ——— at time of service."

Our conclusion is that the service of citation in this case was strictly in accord with the provisions of article 198 of the Code of Practice.

The judgment appealed from is annulled, and the case is remanded to the civil district court to be proceeded with according to law.

MONROE, C. J., and LECHE, J., dissent.



(79 South. 857)

No. 23144.

STATE ex rel. GUILLOT, Sheriff and Ex Officio Tax Collector, v. CENTRAL BANK & TRUST CO.

In re CENTRAL BANK & TRUST CO.

(Nov. 4, 1918.)

(Syllabus by Editorial Staff.)

1. COURTS  $\S$ 224(7) — LOUISIANA SUPREME COURT—APPELLATE JURISDICTION—TAX.

Where the amount of a license tax depends on construction of the revenue statute, the legality of the tax is in contestation, and an appeal lies from the court of first instance directly to the Supreme Court, and is beyond appellate jurisdiction of Court of Appeal.

2. COURTS  $\S$ 487(1) — APPELLATE JURISDICTION—TRANSFER OF CAUSES—STATUTE.

In case involving legality of a tax, beyond jurisdiction of Court of Appeal, but where its want of jurisdiction was not raised, the Supreme Court, in view of subsequent act (Act No. 19 of 1912), and under Const. art. 101, would not dismiss, but would order cause transferred from Court of Appeal to Supreme Court, avoid its judgment, and render judgment which should have been rendered.

3. LICENSES  $\S$ 1—DEFINITION.

A "license" may be defined as a permit, granted by the sovereign generally for a consideration, to a person, firm, or corporation to pursue some occupation or to carry on some business subject to regulation under the police power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, License.]

4. BANKS AND BANKING  $\S$ 12 — LICENSE — "EACH BUSINESS."

In view of Const. art. 229, authorizing license taxes, and under Act No. 171 of 1898, § 3, par. 2, imposing banking license based on declared or nominal capital for each business, and section 30, requiring license for each place of business, the words "each business" mean "each occupation," so that bank having two branches, with same officers and capital, was only liable to one license.

5. STATUTES  $\S$ 219—CONSTRUCTION BY PUBLIC AUTHORITIES.

The practical construction given to a doubtful statute by the public officers of the state, and acted upon by the people thereof, is to be considered, and is perhaps decisive in cases of doubt, as being similar in effect to a course of judicial decisions.

6. STATUTES  $\S$ 219—CONSTRUCTION—LEGISLATURE—ACQUIESCENCE.

The Legislature is presumed to be cognizant of the practical construction of a doubtful stat-

ute by public officers and by the people, and, after long continuance without legislative dissent, the courts will consider themselves warranted in adopting that construction.

Certiorari to Court of Appeal, Parish of Avoyelles.

Proceeding by the State, on relation of Amet Guillot, Sheriff and ex officio Tax Collector of the Parish of Avoyelles, against the Central Bank & Trust Company. There was judgment for plaintiff in the district court. From a judgment of affirmance by the Court of Appeal on appeal, defendant applies for certiorari or writ of review. Judgment of district court annulled, and order that plaintiff's suit be dismissed.

J. W. Joffrion, of Marksville, for appellant.

N. I. Normand, of Marksville, for respondent.

LECHE, J. The Central Bank & Trust Company, incorporated under the laws of this state, having its domicile in the parish of Avoyelles, with its banking house in the town of Mansura, established two branches, one at Hessmer and the other at Bordelonville, also within the parish of Avoyelles. It has a capital stock and surplus of over \$50,000 and under \$100,000. Neither branch has any capital, but each is operated on the capital of the parent bank. The parent corporation has one domicile, one set of directors, one president, and one cashier, under whose supervision the business of the bank is transacted. It has paid one state license for the years 1914, 1915, 1916, and 1917, under the instructions of the state auditor, and its branches neither borrow nor lend money as separate entities nor do they declare or pay dividends. It makes but one statement or report to the state banking department, which includes the combined affairs of itself and its branches.

The present proceeding is by the sheriff

and ex officio tax collector of the parish of Avoyelles to recover three separate state licenses from the Central Bank & Trust Company, one for the parent bank and one for each of its branches.

The district court rendered judgment in favor of the tax collector, and condemned defendant to pay three state licenses. On appeal to the Court of Appeal the judgment of the district court was affirmed, and the case is before us on a writ of review to that court.

The sole issue is one of law; it involves an interpretation of Act 171, page 387, of 1898. The facts are all admitted.

[1, 2] Quoting from *State v. Orfila*, 116 La. 972, 41 South. 227:

"Where the amount of a license tax depends on the construction to be placed on the revenue statute, the legality of the tax is in contestation, and an appeal lies from the court of the first instance directly to the Supreme Court."

The matter involved in this litigation being, then, the legality of a tax, it follows that it was beyond the jurisdiction of the Court of Appeal. But the want of jurisdiction of that court was not raised, nor even suggested, by the parties. We held in a similar case (*State v. Rosenstream, Weiss & Co.*, 52 La. Ann. 2126, 28 South. 294):

"It is competent for this court, acting on a case brought before it by its writ of review from the Court of Appeal, to pronounce void the judgment of the latter court for want of jurisdiction. But this court declines to pass upon the merits of the case coming before it in this irregular and roundabout way, when, by proper action to bring it here on appeal from the court of the first instance, its adjudication upon the merits could have been had in the way provided by law."

We might thus dispose of the present writ, but in view of the fact that, since that decision was rendered, the Legislature has, by Act 19, page 25, of 1912, conferred the right upon this court and the Court of Appeal, where the appellant has appealed to the wrong court, to transfer the case to the proper court instead of dismissing the appeal, and in view of the further fact that the

issue in the present case is so manifestly appealable to this court, instead of the Court of Appeal, we assume that the Court of Appeal, had its attention been called to the matter, would neither have dismissed the appeal nor passed upon the merits of the case, but would have transferred the case to this court, where the appeal should originally have been lodged. That being the judgment which should have been entered by the Court of Appeal, then, under the terms of article 101 of the Constitution, authorizing this court to render such judgment as should have been rendered by that court, it would be a useless formality and only a waste of time to order that court to do that which we may now do ourselves. We therefore, under the authority of article 101 of the Constitution, avoid the judgment of the Court of Appeal, render the judgment which should have been rendered by that court, order the case transferred to this court, and now proceed to pass upon it as if it had been appealed here.

[3, 4] A license may be defined as a permit granted by the sovereign, generally for a consideration, to a person, firm, or corporation to pursue some occupation or to carry on some business which is subject to regulation under the police power of the government. Under article 229 of the Constitution, the General Assembly may levy license taxes on all persons, associations of persons, or corporations pursuing any trade, profession, or calling, with certain enumerated exceptions. Act 171, page 387, of 1898, in section 3, paragraph 2, provides:

"That for each business of carrying on a bank, banking company, association, corporation or agency, the license shall be based on the declared or nominal capital and surplus as follows. \* \* \*"

Plaintiff contends that defendant carries on three separate "business"—one at its main office in Mansura and one at each of its branches in Hessmer and Bordelonville—and is therefore liable for three licenses. Plaintiff cites in support of that contention

section 30 of the same act (171 of 1898), which says:

"That a person, firm or company, having more than one place of business, shall pay a license for each place of business."

Defendant, on the contrary, claims that it conducts one single business, having but one corporate organization and one single capital stock, upon which it can only be held liable for one license.

[5, 6] The above-quoted section 30 of the license law refers, in our opinion, not to the business of banking, but to mercantile business, which is treated of and forms the subject of the preceding section (29). We are further of the opinion that, the tax being based neither upon the amount of business done nor upon the number of places in which it is carried on, but solely upon the amount of the declared or nominal capital of the bank, only one license may be collected by the state from defendant. It is evident, from the basis which the Legislature has adopted in fixing the amount of licenses for banks, that the words "each business" are there used in the sense of "each occupation." Indeed, it is admitted that both the fiscal and banking departments of the state have adopted that interpretation, and that of itself is a persuasive argument in favor of its correctness.

"The practical construction given to a doubtful statute by the public officers of the state, and acted upon by the people thereof, is to be considered; it is perhaps decisive in case of doubt. This is similar in effect to a course of judicial decisions. The Legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction." Sutherland on Statutory Construction, par. 309.

For these reasons the judgment of the district court is avoided, annulled, and reversed, and it is now ordered that plaintiff's suit be dismissed.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 360)

No. 21535.

ROUSSEL et al. v. NEW ORLEANS  
LAND CO.

(June 29, 1918. Rehearing Denied Nov. 4, 1918.)

(Syllabus by Editorial Staff.)

1. EXECUTION  $\S$ 319 — SHERIFF'S DEED —  
TRANSFER OF TITLE.

A sheriff's deed, without the writ and judgment or order of the court authorizing it, is not sufficient evidence of a transfer of title.

2. APPEAL AND ERROR  $\S$ 926(3) — PRESUMPTIONS—RECEPTION OF EVIDENCE.

In ejectment, where defendant claimed title under writ of fi. fa. issued under a judgment in a prior suit, and objection was made to introduction of writ in evidence without a judgment to support it, and objection was overruled, because going only to order of proof, but judgment was not thereafter offered, it must be presumed that there was no valid judgment authorizing sale.

3. EJECTMENT  $\S$ 86(3)—PETITORY ACTION —  
TITLE OF DEFENDANTS—BURDEN OF PROOF.

In ejectment by plaintiffs, whose ancestors had been judicially decreed the land in question, and whose title was complete, if there had been no transfer, defendant, asserting title by a transfer from plaintiffs' authors or ancestors in title, was obliged to prove the transfer.

4. JUDGMENT  $\S$ 829(2) — AUTHORITY — FULL  
FAITH AND CREDIT.

Where judgment or order of federal court did not authorize or purport to authorize a sale of property belonging to certain heirs, or to any one except the city of New Orleans, a receiver's attempted sale of property belonging to such heirs was unauthorized, and hence not protected by full faith and credit clause of federal Constitution.

5. JUDGMENT  $\S$ 829(2)—PARTIES—PROCEEDING TO NULLIFY.

Where judgment or order of federal court was not rendered against certain heirs, but merely authorized sale of property belonging to city of New Orleans, there was no need for an action by those claiming under such heirs to nullify the judgment before insisting on such title or claim.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Willis J. Roussel, administrator, and others, against the New Orleans Land Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Charles Louque, of New Orleans, for appellant.

Lyle Saxon and Wm. Winans Wall, both of New Orleans, for appellees.

O'NIELL, J. The defendant appeals from a judgment decreeing that the plaintiffs are the owners of a tract of land in defendant's possession.

The land was granted by the Spanish government to the plaintiffs' ancestor, Jean Lavergne, in 1771. He died in 1774; and his grandchildren, the children of his only son, Nicholas Lavergne (deceased), were recognized as the owners, by inheritance, of the property, by a decree affirmed by this court in 1841. See *Lavergne's Heirs v. Elkins' Heirs*, 17 La. 220. The plaintiffs in this suit are the heirs and legal representatives of the Laverignes, who were then declared the owners of the property, and who are now dead.

The title asserted by defendant emanates from a sale made by the sheriff of the parish of Orleans, on the 20th of July, 1863, by virtue of a writ of fieri facias, in a suit entitled *Commissioners of the First Draining District v. Heirs of Lavergne*, in the Third District Court of New Orleans. Defendant avers that the title of the Lavergne heirs was, by the sheriff's deed, transferred to the board of commissioners of the draining district; that the land was transferred from the board of commissioners in trust to the city of New Orleans, by Act No. 30 of 1871, p. 75; was sold by J. Ward Gurley, receiver, appointed by the United States Circuit Court, to liquidate the trust of the city of New Orleans, and bought by Dr. C. A. Gaudet, at an auction sale made on the 27th of February, 1892, under orders of said court, in the suit of *Peake v. City of New Orleans*; and was sold by Dr. Gaudet to the defendant on the 16th of February, 1893.

[1, 2] On the trial, when the plaintiffs had made proof of their title by inheritance from

the grandchildren of Jean Lavergne, the defendant introduced in evidence, in support of the alleged transfer of title from the Lavergne heirs to the board of commissioners of the First draining district, only the sheriff's sale and the writ of fieri facias, without the judgment, in the suit of *First Draining District v. Heirs of Lavergne*. Plaintiffs' counsel then objected to the evidence, on the ground that no valid judgment was ever rendered in the case, because the defendants had not been cited. He urged that the statute (Act No. 57 of 1861) purporting to authorize the board of draining commissioners to maintain suits and obtain judgments for taxes, without citation and by substituted process, was unconstitutional, not only because it did not provide for due process of law, but also because there was no reference in the title of the act to the summary proceeding sought to be authorized by the statute. The objection was held to apply, not to the admissibility, but to the effect, of the evidence, because the defendant's counsel could not be controlled in the order of introducing his evidence, and he had yet the right to introduce the judgment on which the writ of fieri facias was said to have issued. He did not, thereafter, offer the judgment in evidence.

In view of the objection to the introduction of the sheriff's deed without the judgment, and in view of the settled jurisprudence that a sheriff's deed, without the writ and judgment or order of court authorizing it, is not sufficient evidence of a transfer of title, we are constrained to assume that there was no valid judgment to authorize the seizure and sale of the property of the heirs of Lavergne. In fact, the plaintiffs afterwards introduced in evidence a judgment rendered on the 27th of January, 1887, in a suit by the heirs of Lavergne against the city of New Orleans, decreeing the plaintiffs to be the owners of the land sold by the sheriff, because of the nullity of the

judgment on which it was seized and sold. The judgment of nullity was not binding upon the defendant in the present suit, because it was not recorded in the conveyance records. But we assume that the learned counsel for defendant regarded the judgment rendered in the suit of Board of Commissioners of the First Draining District v. Heirs of Lavergne as an absolute nullity; for, otherwise, he would have introduced it in evidence when the objection was urged that the sheriff's deed was not sufficient proof without the judgment.

[3] It is contended, on behalf of the defendant, that, if the judgment in favor of the board of commissioners against the heirs of Lavergne was null, the nullity was not patent or absolute, and that the plaintiffs cannot take advantage of the relative nullity in this petitory action, but should have resorted to a direct action of nullity. There might have been some force in that contention, if the defendant had introduced the judgment in evidence. But the defendant's refraining, under the circumstances, from introducing in evidence the judgment on which its title depended, convinces us that the judgment was absolutely null. Be that as it may, there is no judgment before the court to sustain the alleged transfer of title from the heirs of Lavergne to the defendant's author in title. The defendant, having asserted title by transfer from the plaintiffs' authors or ancestors in title, was obliged to prove the transfer, after the plaintiffs proved that their title was complete if there was no such transfer.

[4] The defendant contends that the sale made to Dr. Gaudet under an order of a federal court of competent jurisdiction could not be set aside by collateral proceedings in a state court. The answer is that the plaintiffs here do not seek to set aside the judg-

ment or order of the federal court. That judgment or order, in so far as it authorized the sale of property belonging to the defendant, city of New Orleans, then in court, is not disturbed or affected by this suit. The judgment or order of the federal court did not authorize, or purport to authorize, a sale of property belonging to the Lavergne heirs, or belonging to any one except the city of New Orleans. Hence the attempted sale of property belonging to the Lavergne heirs, by J. Ward Gurley, receiver, was not authorized or sanctioned by any order of the federal court, and is not protected by the full faith and credit clause in the federal Constitution.

[5] The defendant also relies upon a provision in article 612 of the Code of Practice to the effect that one against whom a judgment has been rendered without citation, or even by an incompetent court, cannot maintain a suit for the nullity of the judgment, if he was present in the parish and has suffered the judgment to be executed against him without opposing it. It is sufficient to say that there is no proof in this record that the Lavergne heirs were in the parish of Orleans when the judgment against the city of New Orleans was executed by a seizure and sale of their property. We may add that the judgment or order of the federal court was not rendered against the Lavergne heirs, and there was therefore no need for an action of nullity of the judgment on their part.

The defendant pleaded also the prescription of 5, 10, and 30 years; but the pleas seem to have been abandoned, for the defendant offered no evidence of possession of the land, and no argument has been made, either orally or in the briefs, in support of the pleas of prescription.

The judgment appealed from is affirmed.

(79 South. 861)

No. 23224.

PARKS et al. v. HUGHES, Sheriff, et al.

In re PARKS et al.

(Nov. 4, 1918.)

*(Syllabus by Editorial Staff.)*

**APPEAL AND ERROR 382 — APPEAL FROM DISSOLUTION OF INJUNCTION — AMOUNT OF BOND—STATUTE.**

Where receivers in a separate suit and on a bond fixed at \$2,500 enjoined the sheriff and plaintiffs in executory proceedings, and injunction was dissolved and receivers condemned to pay damages for having obtained the writ illegally, and they took a suspensive appeal, an order that they furnish a new appeal bond exceeding by one-half the sum claimed in executory proceedings, pursuant to Code Prac. art. 575, was error, as order of seizure was already suspended by writ of injunction and as appeal was not from that order.

Suit for injunction by Percy D. Parks and another, receivers of the Interstate Oil, Gas & Development Company, against T. R. Hughes, Sheriff, and others, with reconventional demand for damages for the issuance of the writ. Judgment for defendants dissolving the injunction and condemning plaintiffs to pay damages, and from an order that plaintiffs furnish a new appeal bond on their suspensive appeal, plaintiffs apply for writs of certiorari, prohibition, and amendments. Decree for plaintiffs.

Dart, Kernan & Dart, of New Orleans, and Blanchard & Smith, of Shreveport, for applicants.

Barret & Files, of Shreveport, for respondents.

O'NIELL, J. The question presented for decision is whether the amount of the bond required for a suspensive appeal from a judgment dissolving an ordinary injunction, for which plaintiff had given bond, restraining an order of seizure and sale in executory proceedings, is fixed by law at 50 per cent.

more than the sum claimed in the executory proceedings, or must be fixed by the trial judge in each case.

Morris J. Samuels and others, plaintiffs in executory proceedings, obtained an order of seizure and sale of the property of the Interstate Oil, Gas & Development Company, on mortgage notes amounting to \$8,900, bearing 7 per cent. interest and 10 per cent. attorneys' fees. The receivers of the defendant corporation, who had been appointed on the day before the foreclosure proceedings were instituted, obtained a writ of injunction, on a bond fixed by the judge at \$2,500, in a separate suit against the sheriff and the plaintiffs in the executory proceedings, arresting the foreclosure of the mortgage. On trial of the injunction suit, on its merits, on a plea of estoppel filed by the defendants in that suit, and on their reconventional demand for damages for the issuance of the writ, judgment was rendered in favor of the defendants, dissolving the injunction and condemning the plaintiffs to pay \$1,000 damages for having obtained the writ illegally. The plaintiffs in the injunction suit asked for and were granted a suspensive appeal from the judgment. In his order of appeal, the judge fixed the amount of the appeal bond at \$4,500; and it was furnished promptly by the appellants. The defendants in the injunction suit then filed a motion in the district court, suggesting that the amount of the bond required for a suspensive appeal in such cases was fixed by law at a sum exceeding by one-half the sum claimed in the executory proceedings, and asking that the appeal be dismissed, or the order of appeal revoked, for insufficiency in the amount of the bond. The judge refused to dismiss the appeal or to revoke his order of appeal, but ordered the appellants to furnish a new appeal bond, for an amount exceeding by one-half the sum claimed in the executory proceedings.

The appellants, relators in this proceeding, pray that the district judge be prohibited from requiring a new or an additional appeal bond, and that he be compelled by mandamus to let the appeal stand on the bond fixed by him.

It is not disputed that the amount of the bond furnished in this case is sufficient for a suspensive appeal, if the district judge had authority to fix the amount; that is, if the law does not require a bond for an amount exceeding by one-half the sum claimed in the executory proceedings.

Article 575 of the Code of Practice provides that, in order for an appeal to stay execution and all further proceedings until definitive judgment be rendered on the appeal, the appeal bond must be for a sum exceeding by one-half the amount for which the judgment was given, if it was for a specific sum of money. In other cases, the amount of the bond is fixed by the judge in his order of appeal, according to rules established elsewhere in the Code.

The judgment appealed from, besides being a decree of dissolution of the injunction, is for a specific sum, \$1,000. The appeal bond required by the judge, \$4,500, is sufficient to suspend execution of the judgment for \$1,000 and to answer for costs and damages to the amount of \$3,000 more.

If the appellants, as defendants in the executory proceedings, had appealed from the order of seizure and sale, they would have been required to give bond for an amount exceeding by one-half the sum claimed by the plaintiffs in the executory proceedings, to suspend execution of the order of seizure and sale. That is well settled by the jurisprudence of this court. And it ought to be so, because, in some respects, an order of seizure and sale is like a judgment; it becomes final if not appealed from within 10 days after service of the notice to pay; and the right of appeal from such an order is very

limited, being confined to the question of sufficiency of the authentic evidence on which the fiat issued. See *Borah & Landen v. O'Niell*, 121 La. 752, 46 South. 794, and decisions there cited. But the situation is altogether different when, as in this case, an appeal is taken from a judgment dissolving an injunction that issued on bond in an ordinary suit. In such case, execution of the order of seizure and sale is already suspended by the writ of injunction. The injunction bond is deemed sufficient to secure whatever damages the defendants in the injunction suit may have suffered if it be found that the writ was obtained illegally. Be that as it may, an appeal from a judgment dissolving a writ of injunction in an ordinary suit, restraining an order of seizure and sale in executory proceedings, is not an appeal from the order of seizure and sale; and the amount of the appeal bond is not determined by the amount claimed in the executory proceedings. The jurisprudence on that subject is quite consistent, though there may be some conflict in the rulings regarding an appeal from a judgment dissolving an injunction that issued without bond, under articles 739 and 740 of the Code of Practice. See *State v. Judge*, 19 La. 167; *State ex rel. Stackhouse v. Judge*, 21 La. Ann. 152; *Malain v. Judge*, 29 La. Ann. 793; *Bauer v. Lochte & Cordes*, 30 La. Ann. 685; *Hart v. Lazarus*, 34 La. Ann. 1210; *State ex rel. Cain & Burke v. King, Judge*, 40 La. Ann. 841, 6 South. 108; *Gleason v. Wisdom*, 120 La. 634, 45 South. 531.

The district judge in his return on the rule herein, refers to the decision in *Interstate Trust & Banking Co. v. Powell Bros. & Sanders*, 124 La. 624, 50 South. 605, as holding that, when an injunction against an order of seizure and sale is dissolved, the foreclosure may proceed unless a suspensive appeal is taken from the order of seizure and sale, on a bond for an amount exceeding by

one-half the sum claimed in the executory proceedings. In that case, however, the defendant in the executory proceedings did not obtain or ask for an injunction, but, without tendering bond, merely obtained a rule on the plaintiff to show cause why the order of seizure and sale should not be set aside. The judge issued a temporary restraining order, without requiring bond, and, after trial of the rule, revoked the restraining order. The defendant asked for a suspensive appeal, such as would keep the restraining order in force and thereby suspend execution of the order of seizure and sale, on a bond sufficient only to secure the costs of court. The appeal was asked for in the executory proceedings and would have had the effect of an appeal from the order of seizure and sale. Hence it was held that the appellant should have given bond for an amount exceeding by one-half the sum claimed in the executory proceedings, to suspend execution of the order of seizure and sale.

Our conclusion being that the relators are entitled to the relief prayed for, it is ordered that the district judge be prohibited from requiring a new or an additional appeal bond. The costs of these proceedings are to be borne by the appellees, defendants in the injunction suit.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 863)

No. 22826.

ALEXANDRIA & W. RY. CO. v. RAILROAD COMMISSION OF LOUISIANA.

(Jan. 3, 1918. On the Merits, Nov. 4, 1918.)

(Syllabus by the Court.)

1. RAILROADS  $\S$ 9(2)—APPEAL FROM ORDER OF RAILROAD COMMISSION—RETURN—DISMISSAL.

Although, by article 285 of the Constitution, an appeal from a judgment upholding an

order of the Railroad Commission is returnable within 10 days after the decision of the district court, nevertheless, if the judge commits the error of allowing more than 10 days in his order fixing the return day, the appellant should not suffer dismissal of the appeal for the error of the judge.

On the Merits.

(Syllabus by Editorial Staff.)

2. CARRIERS  $\S$ 12(5)—“JUST AND REASONABLE RATE”—TEST.

To ascertain what constitutes a “just and reasonable rate,” two fundamental principles must be considered, the right of the carrier to a fair return on its investment, and the right of the public to be charged no more than reasonable value of the services.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Rate.]

3. CARRIERS  $\S$ 12(5) — RATES—REASONABLENESS.

In determining reasonableness of rate fixed by legislative authority on particular commodity, the proper test is not whether as to that commodity the rate gives carrier fair compensation after allowing legitimate expenses, but whether on its total freight receipts it can earn enough over operating expenses to give fair and reasonable profit upon its investment.

4. CARRIERS  $\S$ 12(7) — RATES—REASONABLENESS—EVIDENCE.

Order of Railroad Commission fixing rate on lumber and other commodities taking the rate on lumber at 3 cents per 100 pounds, limiting maximum loads to 30,000 pounds between points 11 miles apart on plaintiff's road, allowing a margin of only 22 mills over actual cost of transportation, *held*, on the evidence, unreasonable and unjust.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Suit by the Alexandria & Western Railway Company against the Railroad Commission of Louisiana to set aside a rate order as being unjust, unreasonable, etc. From a judgment refusing plaintiff's demand, and recognizing as valid an amendatory order of the Commission, plaintiff appeals. Reversed, and orders of Commission annulled.

Foster, Milling, Saal & Milling, of New Orleans, for appellant.

Hakenyos & Scott, of Alexandria, and W. M. Barrow, Asst. Atty. Gen., for appellee.



### On Motion to Dismiss Appeal.

O'NIELL, J. [1] The plaintiff prosecutes this appeal from a judgment decreeing an order of the Railroad Commission reasonable, legal and binding upon the railroad company. Article 285 of the Constitution provides that such appeals shall be returned to the Supreme Court within 10 days after the decision of the lower court. In his order granting the appeal, the district judge made it returnable 59 days after the date of the judgment. The appellant had not suggested any return day in his petition for an order of appeal. On motion of appellant's counsel, and on their showing that the clerk of the district court required further time to complete the transcript of appeal, the return day was extended by an order of this court, and the transcript was filed within the extension of time allowed.

The appellee moves to dismiss the appeal because it was not lodged in this court—or made returnable—within 10 days after the decision of the district court.

It is too well settled to require citation of decisions that an appeal should not be dismissed for an error of the judge in fixing the return day. The decisions cited and relied upon by the appellee are not to the contrary. They are all cases where the transcript was not filed within the time fixed in the order of appeal—not cases where, as in this case, the judge allowed more time than the law allowed.

The motion to dismiss the appeal is overruled.

### On the Merits.

LECHE, J. The plaintiff company owns a single line of railroad extending from Alexandria to the town of Gardner, in the parish of Rapides, a distance of about 14.7 miles. The road was constructed between the years 1909 and 1914, and began to be operated as a common carrier on May 1, 1914. It runs

through timber forests, and depends mainly, if not entirely, for its revenues, upon the transportation of logs, lumber, and the output of three sawmills located upon its line. Pursuant to the rules and regulations of the Railroad Commission of this state, plaintiff, with the approval of said Railroad Commission, adopted and published a schedule of freight rates on lumber, and other commodities taking the same rate, for distances under 15 miles and over 10 miles, of 6 cents per 100 pounds, carload lots, 30,000 pounds minimum. Upon complaint by the Chamber of Commerce of the city of Alexandria, on the 27th of October, 1915, this rate, with the approval of the Railroad Commission, was voluntarily reduced by plaintiff to 4 cents per 100 pounds.

On the 1st of April, 1916, the Brewer-Neinstedt Lumber Company, owning one of the three sawmills located on plaintiff's line, and whose mill is situated at Miltonburg, a distance of 11 miles from Alexandria, made formal complaint against plaintiff to the Railroad Commission, charging that said rate was exorbitant and unreasonable, and prayed that it be reduced to 2 cents per 100 pounds, carload lots, 40,000 pounds minimum. Upon hearing, the commission refused to accede to the demand of the Brewer-Neinstedt Lumber Company and dismissed the complaint; but upon rehearing the Railroad Commission issued its order No. 2025, reducing the rate to 2 cents per 100, with carloads, minimum weight 60,000 pounds. Thereupon plaintiff filed the present suit to set aside the order No. 2025 of the Railroad Commission as unreasonable, unjust, and, in effect, confiscatory of its property. The evidence in the case was taken by the district court, and in accordance with the provisions of Act 132 of 1914, before any action by the trial judge, was submitted to the Railroad Commission, which then issued on February 9, 1917, its order No. 2073, amending its previous order

No. 2025, by increasing said rate to 3 cents per 100 pounds. On May 20, 1917, the Railroad Commission, by its order No. 2077, again amended its previous orders Nos. 2025 and 2073, so as to limit minimum loads to 30,000 pounds. The district court thereupon entered judgment on July 13, 1917, refusing plaintiff's demand, and, recognizing as valid the order No. 2077, issued by the defendant commission on May 20, 1917.

The present appeal is from that judgment.

[2-4] The controversy in this case is whether the rate fixed by the Railroad Commission on lumber and other commodities taking the rate of lumber, between Miltonburg and Alexandria, a distance of 11 miles, on the line of plaintiff's railroad, is just and reasonable. Though the decision of that question is bound incidentally to affect the rates for other distances upon the same commodity, and also perhaps the rates on other commodities, we are not here concerned with these results, and we will therefore confine ourselves strictly to the matter at issue.

In order to ascertain what constitutes a just and reasonable rate, two fundamental principles must be considered and followed—the right of the carrier to a fair return on its investment, and the right of the public to be charged no more than the reasonable value of the services. 39 Ann. Cas. 10.

"In determining the reasonableness of a rate fixed by legislative authority on a particular commodity, the proper test is not whether, as to the particular commodity, the rate is sufficiently high to enable the carrier to earn a fair compensation after allowing for legitimate expenses, but whether the carrier will be able from its total freight receipts on all its traffic to earn a sum, above operating expenses reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment." 4 Ruling Case Law, p. 637, par. 106.

In the present case it is shown that the proportionate cost of transporting lumber on plaintiff's railroad, between Miltonburg and Alexandria, is 2.78 cents per 100 pounds.

Such cost does not include taxes and other fixed charges, nor, in calculating the same, was any account taken of the depreciation in the value of the property and of plaintiff's legal right to a fair return on its investment. J. G. Moors, auditor of plaintiff company and its principal witness, testifies that, if fixed charges and overhead expenses be proportionately imputed to the cost of transporting lumber which constitutes approximately one-third of plaintiff's freight, they will increase the same by 3.08 cents per 100 pounds. It appears that plaintiff's taxes for the year preceding the trial of this case amounted to \$3,196.80, that its paid-up stock is \$101,000, and that it is indebted to the Albert Hanson Lumber Company in the sum of \$230,968.22. Mr. Moors takes as a basis for a fair return on investment 5 per cent. on \$313,714.54, or \$15,685.70, and, while we are not prepared to concede the correctness either of his premises or of his conclusions in the latter respect, he has undoubtedly made it evident that the margin of 22 mills allowed by the defendant commission over actual cost of transportation is wholly inadequate to reimburse plaintiff for fixed charges and to enable it to reap a fair profit upon its investment. We can only add, in the language used by this court in the case of *M. L. & T. R. & S. S. Co. v. Railroad Commission*, 127 La. 670, 53 South. 890, the rate here attacked does not meet the requirement of the law, in that it is uncalled for, unreasonable, and unjust, forasmuch as the revenue produced by it would be barely sufficient, if sufficient at all, to pay the actual cost of moving the commodity to which it applies; it would leave nothing or next to nothing wherewith to compensate plaintiff for the use of its property, or for the payment of its debts, or for betterments or dividends.

It is therefore ordered that the judgment appealed from be avoided and reversed, and that orders Nos. 2025, 2073, and 2077, issued

by the Railroad Commission of Louisiana, in the matter of Brewer-Neinstedt Lumber Co. v. Alexandria & Western Ry. Co., on July 18, 1916, February 9, 1917, and May 20, 1917, be set aside and annulled at the cost of defendant and appellee.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 865)

No. 22891.

**JONES v. CITY OF NEW ORLEANS.**

(Nov. 4, 1918.)

(Syllabus by Editorial Staff.)

**1. GRAND JURY ⇄42—GRAND JURY'S RETURN—EFFECT AS EVIDENCE.**

Where the grand jury on investigating a charge of murder by a policeman returned "not a true bill," its return was prima facie evidence that the policeman did not commit a crime.

**2. MUNICIPAL CORPORATIONS ⇄747(3) — WRONGFUL ACT BY SERVANT—LIABILITY.**

Even if the policeman employed by defendant city committed a private wrong against plaintiff, the city could not be held liable therefor in damages.

**3. MUNICIPAL CORPORATIONS ⇄733(1)—CORPORATE OR PRIVATE ENTERPRISE — OPERATION OF BELT RAILWAY.**

The city of New Orleans in operating a belt railroad, as required by Act No. 179 of 1908, § 3, subject to the right of the board of commissioners of the Port of New Orleans to operate it on the city's failure to do so, in acquiring, owning, and operating such railroad was engaged in a governmental function.

**4. MUNICIPAL CORPORATIONS ⇄747(3)—POLICE OFFICERS—NEGLIGENCE.**

A policeman in the performance of his duties is a governmental agent, and his negligence while acting in that capacity cannot give rise to an action in damages ex delicto against the municipal corporation which employs him.

**5. MUNICIPAL CORPORATIONS ⇄747(3)—POLICE OFFICER—PRIVATE EMPLOYÉ—LIABILITY FOR TORT.**

A policeman employed by city of New Orleans and assigned to special duty under city's Public Belt Railroad Commission, and whose salary may have been paid by revenue accruing to that department, whether an employé of commission in a governmental function or

an ordinary policeman, could not render city liable for damages ex delicto for his negligence.

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Mrs. Stella Jones, widow of Joseph McCarthy, against the City of New Orleans. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry Mooney, Wm. H. Byrnes, Jr., and Wm. O'Hara, all of New Orleans, for appellant.

John J. Reilley, Asst. City Atty., and I. D. Moore, City Atty., both of New Orleans, for appellee.

LECHE, J. Joseph McCarthy was shot to death by Alexander Humphreys on one of the docks of the city of New Orleans, April 27, 1915. At that time Humphreys was a policeman assigned to duty under the Public Belt Railroad Commission of the City of New Orleans and was acting as special officer, Public Belt Railroad. The present action is by Mrs. Stella Jones, widow of McCarthy, suing in her individual capacity and as natural tutrix of her minor children, issue of her marriage with McCarthy, against the city of New Orleans for \$30,000 damages for the negligent, wanton, and careless killing of her said husband. The district judge refused plaintiff's demand, and she has appealed.

The record shows that the Public Belt Railroad Commission, as presently constituted, was created by ordinance of the council of the city of New Orleans, adopted October 4, 1904, for the purpose of acquiring, maintaining, and operating a double-track public belt railway in the city of New Orleans for the benefit of the people of said city, in order to connect the freight and passenger terminals of the several railroad systems then or thereafter entering the city of New Orleans and to facilitate shipments to and from industrial plants already situat-

ed or thereafter to be established in said city, and, with that end in view, to transport passengers and freight. In order to provide the means of carrying out the objects of the ordinance, the city council appropriated \$40,000 already collected under a previous ordinance and a further sum of \$10,000 per annum for the years 1906 to 1915, inclusive. After surmounting many difficulties principally of a financial nature, the appropriations made in the ordinance being wholly inadequate to carry out its purposes, the Belt Railroad was finally acquired and established, and was in complete operation at the time of the unfortunate occurrence which gave rise to the present litigation.

When Humphreys killed McCarthy, he was a policeman, appointed in the same manner as all other members of the police force, and vested with the same authority, but assigned to the special duty of protecting the property which came under the control and in the custody of the Belt Railroad. It is not denied that he was acting within the scope of his employment when he did the shooting.

Plaintiff bases her right to recover on three propositions: (1) That the shooting was done negligently, wantonly, and carelessly; (2) that the Belt Railroad is a corporate or private enterprise, and its operation not a government function; and (3) that Humphreys, being an employé of the Belt Railroad, was performing a private duty not governmental or public in its nature.

[1, 2] The killing of McCarthy by Humphreys was investigated by the grand jury for the parish of Orleans, and, upon a charge for murder against Humphreys, that body returned "not a true bill." Although that return is prima facie evidence that Humphreys did not commit a crime, he might nevertheless be guilty of a private wrong against the plaintiff, a matter which in our opinion need not be investigated for two reasons: First,

because this suit is not against Humphreys personally; and, secondly, because, even if Humphreys committed a wrong, the defendant city of New Orleans cannot be held liable therefor in damages.

[3] The second proposition relied upon by plaintiff is far from being easy of solution.

"The distinction between the two capacities of a municipal corporation is important and must be constantly kept in mind, but it is not always easy to draw, as some functions are close to the line and are held governmental in some states but private in others, or even in the same state are held governmental for some purposes and private for others." R. C. L. vol. 19, p. 698.

If the city of New Orleans merely had authority from the Legislature to operate a belt railroad, that enterprise might very plausibly be held to be corporate or private in its nature; but according to section 3, Act 179, p. 256, of 1908, the maintenance of the Belt Railroad is imposed upon the city as a duty of such public importance that in case of failure, upon the part of the city to carry it out, the board of commissioners of the port of New Orleans is empowered, directed, and authorized to administer and operate the system. Whatever doubt may otherwise exist as to the nature of the function performed by the city of New Orleans in acquiring, owning, and operating a belt railroad system, it must yield to the will of the sovereign thus clearly expressed, and the court cannot escape the conclusion that such function is governmental and the city only an agency through which it is performed. We therefore hold that plaintiff's second proposition is erroneous, and that the operation of the Belt Railroad by the city of New Orleans is a governmental function.

[4, 5] Plaintiff's third proposition is, in our opinion, equally unsound. It is not disputed that a policeman in the performance of his duties is a government agent, and that his negligence and carelessness, while acting in that capacity, cannot give rise to an action

in damages ex delicto against the municipal corporation which employs him. Such was the ground upon which plaintiff's demand was refused by the learned judge of the district court. But plaintiff seeks to distinguish Humphreys' occupation from that of an ordinary policeman and to assimilate his position to that of an employé of a private corporation incidentally vested with police authority. Humphreys was commissioned as a policeman by the city of New Orleans; he was under the control of the city authorities; and, though he was assigned to a special duty under a particular department of the city administration and his salary might have been paid by revenues accruing to that department, his employment was of the same nature and for the same general purpose as that of any other policeman. We are therefore of the opinion, whether Humphreys be considered as an employé of the Belt Railroad Commission, a governmental function, or whether he be considered as an ordinary policeman, that plaintiff cannot hold the city of New Orleans liable in damages ex delicto for his negligence or carelessness.

Judgment affirmed.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 867)

No. 21332.

BIEGEL v. CITY OF NEW ORLEANS et al.

(June 29, 1918. Rehearing Denied Nov. 4, 1918.)

(Syllabus by Editorial Staff.)

1. MUNICIPAL CORPORATIONS §831(1)—CONDITION OF STREETS AND CULVERTS—PERSONAL INJURY—LIABILITY.

A city maintaining open ditches and a wooden culvert, conducting drainage water from convergence of ditches at a street corner to a point diagonally across the intersection of the streets, which drainage was inadequate, was not liable for death of an unattended child about

four years old, who fell into ditch and was drawn into culvert and drowned, by reason of its failure to have a grating at end of culvert.

2. NEGLIGENCE §85(3) — CONTRIBUTORY NEGLIGENCE—CHILDREN.

An infant under four years cannot be blamed for negligence.

3. MUNICIPAL CORPORATIONS §723—NEGLECT—PERSONAL INJURY—CHILDREN—LIABILITY.

Municipal corporations cannot foresee or guard against all dangers incident to the rashness of children and are not insurers of the lives or safety of children.

4. MUNICIPAL CORPORATIONS §723—NEGLECT—INJURY TO CHILDREN.

Municipal authorities may presume that for every child under the age of discretion there is some one of mature judgment on whom rests the special duty and responsibility for the safety of the child.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Michael M. Biegel against the City of New Orleans and the Sewerage and Water Board. Judgment for plaintiff against the City and in favor of the Board, and the City appeals. Judgment annulled, and plaintiff's suit dismissed.

John J. Reilley, Asst. City Atty., and I. D. Moore, City Atty., both of New Orleans, for appellant. Clifford E. Hays and Robert J. Perkins, both of New Orleans, for appellee.

O'NIELL, J. This is an action for damages for the death of the plaintiff's child, who was drowned in an aqueduct or culvert. The suit was brought against the sewerage and water board, as well as the city. Judgment was rendered against the city for \$4,000, the sewerage and water board being exonerated from responsibility for the accident. The city alone has appealed.

[1] The child lived with his grandparents, at the corner of two unpaved streets, where there were open ditches about 2½ feet deep and 5 feet wide. The culvert, being a wooden structure 2½ feet deep, 3½ (or possibly 5) feet wide, and nearly 50 feet long, conducted

the drainage water, from the point of convergence of the two ditches at the street corner, diagonally across the intersection of the streets. The system of drainage being inadequate, at the time of the accident, a rain had filled the ditches; and the water was rushing through the culvert. The plaintiff's child, nearly four years old, not attended by an older person, was playing with two smaller children on the sidewalk, and fell into the ditch near the end of the culvert. He was drawn into the culvert and drowned before the neighbors, who came immediately to rescue him, could pry up the heavy planks.

The contention of the plaintiff is that the municipal authorities were guilty of negligence in failing to have a grating or protection of some kind at the end of the culvert to prevent the drowning of a child who might fall into the ditch. It is argued that the authorities had warning of the dangerous situation, from complaints made by the grandfather of the child and by other residents of the neighborhood.

The complaints referred to were merely that the drainage was inadequate and the streets impassable at times. It does not appear that any one in the neighborhood ever feared or contemplated such an accident as happened to the plaintiff's child. And we cannot reconcile our minds to the opinion that the municipal authorities are to be blamed or found guilty of actionable negligence for their failure to foresee and guard against such an extraordinary occurrence as this was. We are not assured—in fact, we have much doubt—that a grating at the end of the culvert, such as is suggested in plaintiff's petition, would have saved the child's life. If such a safeguard had been there and the

child had been killed by being hurled against it, we might now be wondering whether the child could have passed through the unobstructed culvert unhurt.

It is not contended that the municipal government was at fault in failing to have railings along the edge of the sidewalks to prevent children from falling into the gutters or ditches. On the contrary, it must be conceded that the municipality could no more avoid the possibility of a child's falling into an open ditch or gutter than it could make it impossible for a child to fall into the river. The plaintiff's contention, therefore, resolves itself into this: That the city should have had life-saving contrivances for children who might fall into an open ditch.

[2-4] The duty of municipal corporations to keep the streets in a condition of safety to the public has been extended very far in some jurisdictions—in fact, to the limit where we think more consideration must be given to that regard which each individual should have for his own safety. It is true, an infant under four years of age is not to be blamed for negligence; but, as a corollary, municipal governments cannot foresee and guard against all the dangers incident to the rashness of children. Municipalities are not insurers of the lives or safety of children. The municipal authorities have a right to presume that, for every child under the age of discretion, there is some one of mature judgment on whom rests the special duty and responsibility for the safety of the child.

Our conclusion is that the city is not responsible for this deplorable accident.

The judgment against the city of New Orleans is annulled, and plaintiff's demand is rejected, and his suit dismissed at his cost.

(79 South. 868)

Nos. 21210 and 21833.

**FISCHER v. WELLS FARGO & CO.  
EXPRESS et al.**(June 29, 1918. Rehearing Denied Nov. 4,  
1918.)*(Syllabus by Editorial Staff.)***1. LANDLORD AND TENANT §165(4)—INJURY  
TO TENANT'S EMPLOYE—LIABILITY.**

A lessor was not responsible for injury to employé of tenant from the falling of a stepladder nailed to end of a platform, where ladder was no part of leased premises, and was not thereon when leased, or thereafter placed there by any officers or employés, or known to any officer of lessor.

**2. MASTER AND SERVANT §106(1)—PERSONAL  
INJURY—SAFE PLACE FOR WORK.**

Express company, whose leased premises included a platform, etc., and which furnished another safe, convenient, and intended entrance and exit for its employés, was not liable to employé, injured from fall of stepladder nailed to end of platform where there was no invitation to use it as an exit, and it was not furnished or placed by or with consent of company's officers or superior servants.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Albert G. Fischer against the Wells Fargo & Co. Express and the Illinois Central Railroad Company. Judgment for plaintiff against the Wells Fargo & Co. Express, and in favor of defendant Illinois Central Railroad Company, and plaintiff and the Wells Fargo & Co. Express appeal, and on plaintiff's death his legal representatives prosecuted his appeal. Judgment for defendant Illinois Central Railroad Company affirmed, and judgment against Wells Fargo & Co. Express annulled and suit dismissed.

Johnston Armstrong, of New Orleans, for appellant Wells Fargo & Co. Express. John J. McCloskey and Malcolm J. Taylor, both of New Orleans, for appellant Fischer. Lemle & Lemle, of New Orleans (Blewett Lee and R. V. Fletcher, both of Chicago, Ill., of counsel), for appellee Illinois Cent. R. Co.

O'NIELL, J. This is an action for damages for personal injuries. A stepladder that was nailed to the end of a platform, on which the plaintiff worked, came loose and fell when he stepped upon it, and he suffered serious injuries by the fall. The express company was the plaintiff's employer. The railroad company was the owner and lessor of the premises occupied by the express company, where the accident occurred. The action against the express company is founded upon the doctrine of responsibility of the master for failure to provide a safe place of employment for the servant; and the action against the railroad company is founded upon the provisions of the Civil Code, to the effect that the owner of a building is responsible for injuries resulting from his failure to keep it in repair. Judgment was rendered against the express company for \$7,500; the demand against the railroad company being rejected. The plaintiff and the express company both appealed. Thereafter the plaintiff died, and his legal representatives are prosecuting the appeal taken by him.

There is no doubt or dispute about the important facts of the case. The platform from which the plaintiff stepped and fell was about four feet high; the top of the ladder being a few inches lower. The approach from the street to the platform was by way of an incline, intended apparently for both pedestrians and wagons. A railroad track extended along the opposite side of the platform and into a private park of the railroad company, which was not leased to the express company. The end of the platform, on which the stepladder was nailed, also abutted on the private park. The employés of the express company were neither forbidden nor expressly permitted to go through the private park to and from their work, and they generally used that route. Some of the railroad employés, working on or about the private cars in the park, also went to and from their

work by way of a paved walk leading to the premises occupied by the express company. As a matter of convenience, therefore, some one nailed the stepladder to the end of the platform, and it had been there, used habitually by employes of the express company and of the railroad company, for several months before the accident. No one who testified in the case knew who had put the ladder there. It has the appearance of a discarded one of the stepladders used by porters on passenger coaches; and the supposition of a number of the witnesses was that one of the employes of either the railroad company or express company nailed the ladder to the end of the platform as a matter of convenience to himself and other employes. It was in an obscure place, beside some shrubbery; and no officer of either company, nor employe having greater authority than the plaintiff had, knew the ladder was there. The plaintiff's work was to load and unload express cars placed beside the platform. He had been working during the night before the accident, and finished a few minutes before 6 o'clock in the morning. The route to his home was about 50 or 75 feet shorter through the park than by way of the street; and, as was his custom, he intended to take the shorter route. When he stepped from the platform to the top step of the ladder, the nails that held it to the end planks of the platform gave way and it fell to the ground with him. There is some testimony to the effect that the boards where the lad-

der was nailed had rotted; but that is contradicted, and the most plausible theory, from the evidence before us, is that the ladder was not nailed securely enough for the nails to hold.

[1] The railroad company is not responsible for the accident, because the ladder formed no part of the leased property, and was not even on the premises when the lease was made, and there is no proof that it was put there afterwards by any officer or employe of the railroad company.

[2] Nor do we find any basis for the judgment against the express company. As far as the evidence shows, the ladder was not furnished nor put in place by or with the knowledge of any officer or superior servant of the express company. The latter furnished a safe and convenient way for the employes to go to and from their work. That was by way of the incline extending to or towards the street, and that was the proper route—the only route provided or intended—for the employes to go to and from their work. There was no invitation, express or implied, for any employe of the express company to go through the private park of the railroad company; hence no duty, on the part of the express company, to furnish a safe means of getting down from the platform into the park.

The judgment in favor of the railroad company is affirmed, and the judgment against the express company is annulled, and the suit dismissed, at the cost of the plaintiffs.



(79 South. 869)

No. 22996.

VANON v. LOUISIANA RY. &amp; NAV. CO.

(Nov. 4, 1918.)

*(Syllabus by the Court.)*RAILROADS ~~§~~381(3)—INJURY TO PERSON ON TRACK.

One who is negligent cannot recover damages from a railroad company for personal injuries, and where the company is not negligent.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Eliza Vanon against the Louisiana Railway & Navigation Company. Judgment for plaintiff for \$1,000, and defendant appeals, and plaintiff answering the appeal asks for an increase in the amount of the judgment. Judgment reversed and set aside, and suit dismissed.

Foster, Milling, Saal & Milling, of New Orleans, for appellant.

Joseph Rosenberg and Thomas E. Furlow, of New Orleans, for appellee.

SOMMERVILLE, J. Defendant appeals from a judgment for \$1,000 in favor of plaintiff, for personal injuries suffered by her while walking on the track of the defendant company in the city of New Orleans.

Plaintiff answers the appeal, and asks for an increase in the amount of the judgment.

The defendant company denies the alleged negligence on its part; and charges that plaintiff was a trespasser on its yards, and that she was negligent.

The evidence of plaintiff is uncertain and contradictory, and must be rejected for the most part.

The testimony of defendant's witnesses shows that plaintiff negligently walked upon the track, and that she failed to heed the signals given by defendant's employes, and leave the track in time to avoid coming into collision with the engine, which resulted in

her injuries. The locomotive of the defendant company was properly manned with a lookout, and the warning signals of its approach were given and heeded by others who were near the plaintiff at the time.

We find that the plaintiff was negligent, and that the defendant was not.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed and set aside; and that there be judgment in favor of defendant dismissing plaintiff's suits at her costs.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 870)

No. 23014.

THOMPSON v. DAY, Sheriff and Tax Collector, et al.

(Nov. 4, 1918.)

*(Syllabus by the Court.)*1. TAXATION ~~§~~98 — PROPERTY SUBJECT — RIGHT TO VESSEL.

A vessel engaged in overseas trade ceases to be a seagoing vessel when it is wrecked and sunk and sold by the owners to third parties. It then becomes simply valuable wreckage, and subject to assessment and taxation as the property of the new owners, situated within the state.

2. TAXATION ~~§~~611(5) — IRREGULARITIES OF ASSESSMENT—INJUNCTION—PETITION.

Only those irregularities charged against an assessment of property which are alleged in the petition will be considered by the court, especially where there is no evidence to support the irregularities alleged in the argument.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action for injunction by J. W. Thompson against R. B. Day, Sheriff and Tax Collector, and others. Judgment for defendants, dissolving the preliminary injunctions and dismissing the suit, and plaintiff appeals. Affirmed.

T. Jones Cross, of Baton Rouge, for appellant.

A. V. Coco, Atty. Gen., and A. J. Thomas, of Baton Rouge (W. Carruth Jones, of Baton Rouge, and Harry P. Sneed, of New Orleans, of counsel), for appellees.

SOMMERVILLE, J. Plaintiff, domiciled and residing in St. Louis, Mo., enjoins the seizure and sale of the steamship Gut Heil for taxes for 1915, 1916, and 1917. The vessel had been rammed and sunk in 1912, and has been lying partially submerged in the Mississippi river since that time, within the parish of East Baton Rouge. Plaintiff became the owner in November, 1916.

Plaintiff claims exemption from taxation for his property under the federal and state Constitutions, and he alleges irregularities in the assessments thereof.

There was judgment in favor of the defendants, dissolving the preliminary injunctions, and the suit was dismissed. Plaintiff has appealed.

The Constitution provides for the taxing of all property; and the revenue statute imposes taxes upon all vessels, for which taxes have not been paid at their domiciles.

[1] The Gut Heil ceased to be engaged in overseas trade in 1912 when she was rammed and sunk in the Mississippi river. At that time, she became valuable wreckage, owned by German citizens, who subsequently sold her to others; and she finally became the property of the plaintiff.

As the vessel was not engaged in overseas trade at the time it was assessed for taxation, and as it is not alleged or shown that she was registered at any port whatever, or that taxes had been paid thereon in any place, the action of the defendant in assessing the property is not violative of the commerce clause of the federal Constitution. The assessment and taxation of her is not an interference with interstate or foreign commerce to any extent.

Until the vessel has been raised and she is engaged in interstate or overseas trade and commerce, which may now be her true condition, she was not exempt from taxation under the amendment of the state Constitution. Act No. 253, p. 38, Ex. Sess., 1917. Only ships engaged in overseas trade and commerce, and domiciled in a Louisiana port, are exempted from taxation under the amendment.

The Gut Heil has not been engaged in commerce since 1912; she has not been a vessel incidentally or temporarily detained in the parish of East Baton Rouge for any cause. Her owners took or sent her there for the purpose of commerce; but after she was sunk and had become a wreck they abandoned their intention of engaging her further in commerce, and they sold the wreck. The present owner bought a wrecked vessel, perhaps with the intention of raising her and engaging her in overseas commerce; but as such wreckage she was subject to taxation, until she is engaged in overseas trade and commerce.

[2] In argument, it was stated that the assessments were supplemental, and that they had been made in the name of an unknown owner for two of the three years, and for all three years on one roll, instead of on separate rolls, in 1917. But these matters were not alleged in the petition, and there was no evidence on these points, except in answer to the question by the counsel for the defendant, "Did you know, at the time she was assessed to unknown owners, who her owner was?" the assessor answered, "I did not."

It is alleged in the petition:

That the defendant the tax assessor "assessed said steamship for the years of 1915, 1916, and 1917, at a valuation of \$100,000 for each of said years. \* \* \* That the assessment and levy of said taxes upon said ship are illegal, null, and void because, under the manner in which said assessment and levy have been made by the assessor of the said parish of East Baton Rouge, no review of said assessment had been had; the owner had no opportunity or means of inspection and correction of said assessment and levy; and,

particularly, had not published a notice in a newspaper published in this parish that the listing of this property has been completed and the estimated valuation made therein by the assessor, and that said list shall be exposed in the office of the assessor," etc.

Plaintiff offered no evidence in support of these allegations, except to examine the assessor, as on cross-examination; and he testified that the property was listed and valued by him in April, and that the rolls were subsequently submitted to the police jury, sitting as a board of reviewers, who reviewed the assessment rolls for 1917 in his office. The assessor published a notice in the State-Times, a daily newspaper published in the city of Baton Rouge, on Wednesday, May 2, 1917, notifying "all persons liable to taxation" that the assessment rolls had been completed and that the lists would be exposed in his office for inspection and correction, for a term of 20 days beginning next after 10 days' notice shall have expired. All taxpayers were invited to examine the rolls and to test the correctness of the same in a manner prescribed by law.

A similar notice was published in the same paper August 22, 1917, stating that a board of state affairs had officially passed on the assessments for state purposes, and that the rolls were in the assessor's office and open for inspection for 20 days; and taxpayers were notified to examine their assessments prior to meeting of the police jury, sitting as a board of review, the meeting to be held September 11, 1917.

The irregularities in the assessments as set forth in the plaintiff's petition were disproved by the above referred to evidence, and the assessments must therefore stand.

The judgment appealed from is affirmed, at appellant's cost.

O'NIELL, J., takes no part, having been absent during the argument.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 871)

No. 23304.

# BROOKS-SCANLON CO. v. RAILROAD COMMISSION OF LOUISIANA.

In re RAILROAD COMMISSION OF LOUISIANA.

(Nov. 4, 1918.)

*(Syllabus by Editorial Staff.)*

## 1. COURTS ~~§~~209(1)—SUPERVISORY CONTROL— CONSIDERATION OF MERITS.

In suit to set aside order of Railroad Commission, wherein an injunction, obtained by commission, was set aside, and it applied for writs of certiorari and prohibition, validity of order can be passed upon only by virtue of Supreme Court's jurisdiction on appeal in regular course.

## 2. COURTS ~~§~~207(2, 5) — SUPERVISORY JURIS- DICTION—DENIAL OF REMEDY.

In such suit, wherein injunction obtained by commission was set aside on bond, and where it made no demand on trial judge to vacate order of dissolution or any attempt to suspend execution of order by suspensive appeal, its application to Supreme Court for supervisory writs of certiorari and prohibition will be denied.

Suit by the Brooks-Scanlon Company against the Railroad Commission of Louisiana to have an order of the commission set aside, in which defendant obtained an injunction. Injunction set aside, and the commission applies for writs of certiorari and prohibition. Writs refused.

W. M. Barrow, Asst. Atty. Gen., for relator.

R. C. & S. Reid, of Amite, for respondent.

LECHE, J. The Railroad Commission of Louisiana, relator in the present proceeding, after due hearing, issued on August 5, 1918, its order No. 2228, directing plaintiff, the Brooks-Scanlon Company, to operate its narrow gauge line of railroad between Kentwood, La., and Hackley, La., by running mixed passenger and freight trains thereon upon such convenient schedules and upon such days as may be approved by the commission. On August 16, 1918, the plaintiff then brought suit in the district court, in the

parish of East Baton Rouge, to have the order 2228 set aside and annulled as unjust, unreasonable, and ultra vires. Shortly thereafter, relator answered the demand of plaintiff, and, alleging that plaintiff was taking up the rails and tearing the track of its railroad, reconvened and obtained on September 5, 1918, an order of injunction prohibiting plaintiff from disturbing or destroying its railroad track between Kentwood and Hackley. On application by plaintiff, the district judge set aside the order of injunction on a bond for \$75,000, whereupon relator filed in this court the present proceeding, in which it prays that a writ of prohibition issue to the judge of the Twenty-Second judicial district court for the parish of East Baton Rouge and to the plaintiff herein, forbidding them from further proceeding in said cause, and commanding them to show cause why said writ of prohibition should not be made perpetual.

#### Opinion.

[1] In the briefs filed by relator and by respondent, much of the argument is devoted to the merits of the controversy now pending between the parties in the district court. We are powerless at the present time to trench upon the question of the validity of the order No. 2228 of the Railroad Commission, because that matter may only be passed upon by this court by virtue of its appellate jurisdiction when the case comes up on appeal in regular course.

[2] The preliminary question to be decided here is whether relator has the right to invoke the supervisory process of this court without first exhausting its remedies in the trial court. After the respondent judge ordered the injunction of September 5, 1918, set aside on bond, relator made no demand upon him, either to vacate the order of dissolution, which he might have done in a proper proceeding, nor did it attempt to suspend the execution of the said order of dis-

solution by suspensively appealing from it; but relator at once, without giving the trial judge an opportunity to correct the error, if error there was, in issuing said order, applied to this court for remedial writs. Relator made no attempt to obtain relief from the district court, but at once came here for redress, which, so far as the record shows, has never been refused to it, and which most likely it might readily have secured from that tribunal.

We lately held in the case of *Firemen's Insurance Co. v. Hava*, 141 La. 347, 75 South. 76, that:

"The Supreme Court will not exercise supervisory jurisdiction by the issuance of a writ of prohibition to a court of original jurisdiction, when it appears from the record that the party complaining has made no attempt to obtain relief, and might have obtained it, from the court of original jurisdiction."

The rule of practice as thus announced rests upon numerous adjudications of this court. It is sound, conservative, and necessary to the orderly administration of justice; and by reason thereof, it is ordered that the rule to show cause, herein issued, be vacated, and the writ applied for refused, at the costs of relator.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 872)

No. 21715.

SABINE TRAM CO. v. JURGENS et al.

(Nov. 4, 1918.)

(Syllabus by Editorial Staff.)

1. LIBEL AND SLANDER ~~§~~6(2)—ACTIONABLE WORDS—INJURY TO BUSINESS.

False allegations in petitions accusing plaintiff of certain acts of fraud as a stockholder and director of a corporation were libelous.

2. LIBEL AND SLANDER ~~§~~56(2) — TRUTH OF ALLEGATIONS — PROBABLE CAUSE FOR RELIEF.

Where plaintiff employed an expert accountant to audit the books of a corporation and had

his report disclosing facts pertaining to transactions on which its charges of fraud against defendant, a stockholder and director, were judicially made in its petitions, there was no probable cause for plaintiff to believe such allegations true.

**3. LIBEL AND SLANDER §56(2) — ABSOLUTE PRIVILEGE—JUDICIAL PROCEEDINGS.**

No one has a right or privilege to deem appropriate or pertinent to an issue presented for decision, in a judicial proceeding, a libelous allegation that he knows is false, or that he has no just or probable cause to believe is true.

**4. LIBEL AND SLANDER §121(1) — DISCRETION OF TRIAL COURT—DAMAGES.**

A judgment for \$1,000, in an action for a libel contained in petitions in judicial allegations, in view of plaintiff's extended business dealings and his high commercial and social position, and in view of Civ. Code, art. 1934, giving much discretion in assessment of damages to trial judge, was not an abuse of discretion.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by the Sabine Tram Company against George Jurgens and others, with reconventional demand for damages for libel by defendant George Jurgens. Judgment for defendant in reconvention for part of his claim, and he appeals. Affirmed.

McCloskey & Benedict, of New Orleans, for appellant.

Howe, Fenner, Spencer & Cocke, of New Orleans, and R. A. Greer, of Memphis, Tenn., for appellee.

**O'NIELL, J.** The only matter in contest here is a reconventional demand on the part of the defendant George Jurgens for damages for libel, based upon judicial allegations in which the plaintiff accused him of certain acts of fraud.

The allegations complained of were made by the plaintiff, first in his original petition in this suit, then in a supplemental petition, and afterwards in a petition filed, at the instigation of the plaintiff, by the receiver of a corporation styled Southwestern Lumber & Exporting Company, of which Jurgens was a stockholder and director. Jurgens was acquitted of the charges of fraud by the judg-

ment of this court. See *Peck v. Southwestern Lumber & Exporting Co.* (Intervention of Sabine Tram Co.), 131 La. 177, 59 South. 113, and *Commercial Germania Trust & Savings Bank, Receiver, v. Jurgens*, 134 La. 755, 64 South. 703. Thereafter, on this reconventional demand of Jurgens for \$75,000 damages for libel, the court gave judgment in his favor for \$1,000; and he prosecutes this appeal. The Sabine Tram Company, answering the appeal, prays that the demand be rejected entirely.

[1, 2] The charges of fraud were essentially injurious to appellant, and, having been found to be untrue, were libelous. The appellee had employed an expert accountant to audit the books of the Southwestern Lumber & Exporting Company and had his report disclosing the facts pertaining to the transactions on which the charges of fraud were made against appellant. Hence there was not probable cause for appellee to believe to be true the allegations which have been adjudged false.

[3] The contention of the appellee is that the allegations complained of were protected by an absolute privilege because they were pertinent to an issue presented for decision in a judicial proceeding. The learned counsel for appellee invoked the doctrine prevailing in England and in the jurisdiction of some of the courts of this country that every allegation that is pertinent to an issue presented for decision in a judicial proceeding is protected by an absolute privilege, and that such an allegation cannot be a cause of action for libel or slander even though it was a false and injurious accusation, and even though the party making it knew it was false, or had not just or probable cause to believe it to be true. It is sufficient to say that that doctrine has no place in the system of law prevailing in Louisiana. See *Lescale v. Schwartz*, 116 La. 293, 40 South. 708, reviewing and reconciling the jurisprudence on the subject. No one has a right to

deem appropriate or pertinent to an issue presented for decision in a judicial proceeding a libelous allegation that he knows is false or that he has not just or probable cause to believe is true.

[4] The only question to be determined, therefore, is whether the district judge has allowed more or less than adequate compensation for the injury done to appellant. The evidence shows that his business dealings extended far and wide, that his commercial standing and social position were very high, and that the injury he suffered was therefore somewhat serious. It would serve no purpose, however, to discuss the evidence on that subject. The amount of the judgment is a substantial sum. The appellant is a man of large means, to whom the vindication he has received by the judgment of this court is perhaps more compensating than a considerable sum of money would be. The provision, in article 1834 of the Civil Code, that, in the assessment of damages, in cases like this, much discretion must be left to the judge or jury, refers particularly to the trial judge or jury. It does not appear that there was an abuse of discretion in the assessment of damages in this case.

The judgment appealed from is affirmed. The appellee is to pay the costs of the district court; the appellant, the costs of appeal.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 873)

No. 22615.

Succession of LASSEIGNE.

(Nov. 4, 1918.)

(Syllabus by Editorial Staff.)

EXECUTORS AND ADMINISTRATORS ↔ 10—JURISDICTION—DOMICILE OF DECEASED.

Where a husband abandons his wife, and goes and resides with another woman, the wife

cannot follow him, and her domicile does not follow his, notwithstanding Civ. Code, arts. 39, 120, and at her death at husband's former residence she would be domiciled there in respect to jurisdiction over her succession.

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

In the matter of the succession of Mrs. Floriska Lasseigne, wife of Francois P. Lions. Petition by Francois P. Lions to be appointed administrator, opposed by the heirs of the deceased, was denied, his demand dismissed, and he appeals. Affirmed.

Alfred D. Danziger, of New Orleans (Percival H. Stern, of New Orleans, of counsel), for appellant.

J. V. Chenet, of Garyville, for appellees.

LECHE, J. Francois P. Lions and his wife, Floriska Lasseigne, resided for many years in the parish of St. John the Baptist, where they reared a family of five children, all of whom have attained the age of majority. Some eight or nine years before the institution of the present proceedings, Lions abandoned the matrimonial domicile in St. John and went to New Orleans, where, as indicated by the evidence, he has since resided with another woman. His wife remained in St. John, where she died in January, 1916. Her succession was opened in that parish, and her five children were put in possession of her estate. Some time afterward, in March, 1916, Lions petitioned the civil district court for the parish of Orleans to be appointed administrator of his wife's succession, and the heirs of Mrs. Lions intervened, opposed the reopening of the succession, and prayed for the refusal and dismissal of their father's application. The trial judge, being of the opinion that the succession proceedings had in St. John parish could not thus be ignored, and that they should be presumed to be regular and valid until set aside in a direct ac-

tion, denied Lions' application and dismissed his demand, with costs.

The present appeal was taken by Lions, who contends that the judgment of the district court for St. John parish is an absolute nullity, for the reason that Mrs. Lions' legal domicile was, at the time of her death, in New Orleans, and that court was without jurisdiction *ratione materiæ*.

The sole matter to be decided here is whether the district court for the parish of St. John had jurisdiction over the succession of Mrs. Lions. Believing that it had such jurisdiction, there is then no necessity of our expressing any opinion, in the event that court had no jurisdiction, whether its judgment would have been absolutely or merely relatively null. Nor is there any necessity of our deciding, where the residence of a deceased person was in one parish and his legal domicile in another, whether the court of his residence or the court of his domicile has jurisdiction over the settlement of his succession, a distinction which seems to be justified by the terms of article 929, C. P., and which this court recognized in *Oglesby v. Turner*, 127 La. 1094, 54 South. 400, for we believe that Mrs. Lions' domicile, as well as her residence, was in St. John parish.

According to article 39, C. C., a married woman has no other domicile than that of her husband. The reason of the rule is founded on good morals; the wife is bound to live with her husband, and to follow him wherever he chooses to reside. Article 120, C. C. But where the husband abandons her, and chooses to go and reside with another consort, the reason for the rule disappears. The wife cannot follow him, and to hold that her domicile is in a place where good morals prevent her from residing would be to sacrifice the purpose of the rule in order to adhere to its words.

Most appropriate is what we said in

*Champon v. Champon*, 40 La. Ann. 31, 3 South. 399:

"It would do violence to the plainest principle of common sense and common justice to call this residence of the guilty husband, where the wife is forbidden to come, or of which she knows nothing, the domicile of the wife."

The judgment appealed from is affirmed.

PROVOSTY, J., absent on account of illness, takes no part.

(79 South. 873)

No. 23254.

WILLIAMSON v. CRIDELLE et al.

(Nov. 4, 1918.)

(*Syllabus by Editorial Staff.*)

COURTS ~~§~~224(2) — LOUISIANA SUPREME COURT—JURISDICTION—AMOUNT.

In a suit to have a municipal election declared void, and in the alternative that plaintiff be decreed mayor, without allegation of evidence of amount involved, and where salary of mayor could not be over \$2,000, the Supreme Court was without jurisdiction of plaintiff's appeal.

Appeal from Sixth Judicial District Court, Parish of Morehouse; Ben C. Dawkins, Judge.

Suit by George F. Williamson against Dr. R. L. Cridelle and others. From a judgment dismissing the suit, plaintiff appeals. Appeal dismissed.

J. T. Shell, of Bastrop, for appellant.

H. Flood Madison, of Bastrop, for appellees.

On Motion to Dismiss Appeal.

SOMMERVILLE, J. Plaintiff appeals from a judgment dismissing his suit to have declared null and void the municipal election held in the village of Bonita on April 16,

1918, and, in the alternative, that he be decreed to have been elected mayor of the village.

There is no allegation or evidence in the record as to the amount involved. The salary of the office of mayor of a village for two years cannot be over \$2,000. The court is therefore without jurisdiction.

For the reasons assigned in *Rownd v. Cornish*, 130 La. 739, 58 South. 528, *Landry v.*

*Gonzales*, 142 La. 577, 77 South. 287, *Aubert v. Burns*, 142 La. 895, 77 South. 782, *Oberly v. Calcasieu Parish School Board*, 142 La. 788, 77 South. 600, *Dejean v. Breaux*, 140 La. 378, 73 South. 238, and the authorities cited in those cases—

The appeal is dismissed.

PROVOSTY, J., absent on account of illness, takes no part.



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### § 1. Decisions reviewable.

Where transcript discloses verdict but no judgment pursuant thereto, either rendered or signed, no appeal lies, and the appellate jurisdiction of Supreme Court does not attach, and an attempted appeal will be dismissed.—*State ex rel. Hodge v. Oliver*, 180.

Defendant's appeal from interlocutory order striking the call in warranty from the record taken at the termination of the suit was taken at the proper time.—*Vance v. Noel*, 477.

Where the entire relief sought is an injunction and the writ is denied after a hearing on a rule nisi, the judgment will be regarded as final and appealable.—*Wunderlich v. New Orleans Ry. & Light Co.*, 626.

Where a sequestration obtained to protect a property right is dissolved on bond, the order of dissolution is appealable.—*Davenport v. Sterling Lumber Co.*, 671; *In re Davenport*, Id.

### § 2. Right of review.

Appellant's receipt of portion of amount decreed to him by judgment is acquiescence in the judgment and defeats an appeal.—*Raines v. Dunson*, 321.

Appellant's acquiescence in a judgment by receiving part of amount of judgment, so as to defeat an appeal, is not affected because he undertakes to reserve his appeal.—Id.

### § 3. Presentation and reservation in lower court of grounds of review.

Where evidence was offered and admitted without objection by defendant, it was too late to urge the objection on appeal.—*Iberville Wholesale Grocery Co. v. People's Bank*, 278.

A contention by defendant in a town's suit for the benefit of a paving contractor that the work was not completed within one year from the date of the contract cannot be considered, where it was not urged in defense to the suit.—*Town of Winnfield v. Collins*, 493.

A supplemental petition dismissed on defendant's exception of want of jurisdiction is not reviewable by appellate court, where there was no objection to district court's ruling reserved thereto.—*J. J. Stovall & Sons v. Hubier*, 1028; *In re Hubier*, Id.

### § 4. Requisites and proceedings for transfer of cause.

All that is necessary to maintain appeal is that bond in right amount be filed, and where both suspensive and devolutive appeals have been taken, one bond will serve for suspensive appeal, if filed in time; if not, for devolutive appeal.—*Bernheim v. Pessou*, 609.

Under Act No. 173, of 1902, providing that parish and municipal boards exercising police powers or administering public functions shall not be required to furnish bonds in judicial proceedings, police juries, even as boards of reviewers of assessment, are exempt from furnishing appeal bonds.—*Hayne v. Assessor*, 697; *Natalie Oil Co. v. Same*, Id.

The Supreme Court has no jurisdiction to entertain an appeal without an order of appeal from the trial court.—*Sammons v. New Orleans Ry. & Light Co.*, 731.

An order of appeal from the trial court cannot be waived or dispensed with even by the appellee.—Id.

Where appellant after time allowed for perfecting suspensive appeal had passed, but within time for devolutive appeal, filed a bond for amount fixed for a suspensive appeal, appeal will not be dismissed but will be maintained as a devolutive appeal.—*Brinkman v. Succession of Posey*, 824.

Where receivers in a separate suit obtained an injunction on a bond fixed at \$2,500, against sheriff and plaintiffs in executory proceedings, and injunction was dissolved and receivers condemned to pay damages for having obtained writ illegally, an order pursuant to Code Prac. art. 575, that receivers taking a suspensive appeal furnish a new appeal bond exceeding by one-half the sum claimed in executory proceedings, was error, as order of seizure was suspended by injunction and as appeal was not from that order.—*Parks v. Hughes*, 1083; *In re Parks*, Id.

### § 5. Suspensive appeal.

If setting aside of a judicial sequestration obtained on defendant's suggestion, upon plaintiff's furnishing bond, would cause irreparable injury to defendant, an order for a suspensive appeal from the order of bonding was properly issued, and otherwise it should be refused.—*Davenport v. Sterling Lumber Co.*, 671; *In re Davenport*, Id.

### § 6. Record and proceedings not in record.

Ex parte allegations in pleadings filed in Supreme Court as to facts aliunde the transcript cannot be considered.—*Wunderlich v. New Orleans Ry. & Light Co.*, 628.

Supreme Court will not order that transcript of an appeal in one case be considered in another on allegation of a party that the transcript contains documents offered in the other case, if allegation was contradicted and is not supported by record of proceedings in lower court.—*St. John Lumber Co. v. Federal Nat. Bank*, 693.

An appeal should not be dismissed on appellee's mere allegation that certain documents not in transcript were introduced in evidence, if the clerk's certificate shows that the transcript is complete and there is no showing to the contrary.—Id.

Under Code Prac. art. 898, an appeal should not be dismissed for error in clerk's certificate of correctness and completeness of transcript if it does not appear that error is imputable to the appellant, and in such cases reasonable time should be allowed to correct the error.—*Hayne v. Assessor*, 697; *Natalie Oil Co. v. Same*, Id.

Under Act No. 229 of 1910, where a transcript of appeal made by direction of the appellant omitted parts of the record, the appellant would be allowed 30 days in which to have errors in clerk's certificate corrected, during which time either party might file any omitted part of the record as a supplemental transcript.—Id.

Code Prac. art. 883, means, not that appellant must make formal demand to have benefit of three days' grace, but that if requiring further time he must make demand therein and show appellate court that event not under his control prevented filing of record on or before

return day.—*Sammons v. New Orleans Ry. & Light Co.*, 731.

Where the omission of a copy of a document from the transcript of appeal was not the fault of the appellant, who gave no instructions to the clerk of the civil district court for making up the manuscript, the appeal should not be dismissed on account of such omission.—*Brinkman v. Succession of Posey*, 924.

A supplemental petition dismissed on defendant's exception of want of jurisdiction is not reviewable by appellate court, where there was no bill of exceptions reserved thereto.—*J. J. Stovall & Sons v. Hubier*, 1028; *In re Hubier*, Id.

#### § 7. Dismissal, withdrawal, or abandonment.

On motion to dismiss appeal presenting question of fact as to plaintiff's acquiescence in judgment, case would be remanded to court below to take testimony and consideration of case continued until such evidence was taken and filed.—*Raines v. Dunson*, 321.

The Supreme Court will take notice of the absence of an order of appeal and, of its own motion, dismiss the appeal.—*Sammons v. New Orleans Ry. & Light Co.*, 731.

Inclusion of superfluous matter in condition of an appeal bond is an informality for which appeal will not be dismissed, especially where the motion to dismiss was filed more than three days after return day.—Id.

#### § 8. Hearing and rehearing.

Where opposition to receiver's account was dismissed, opponent taking a devolutive appeal, held entitled under Supreme Court rule 1, § 8 (67 South. vii, 136 La. viii), to a suspension of proceedings to afford him a reasonable time to cite the necessary parties.—*Garsaud v. Mandeville Light & Ice Co.*, 563.

#### § 9. Review.

A plea of estoppel, filed originally in an appellate court, based upon allegations of fact antedating the trial of the case, cannot be allowed or considered, unless the record contains evidence of the facts alleged.—*Tyler v. Lewis*, 229.

The overruling of an exception of no cause of action, where all rights thereunder have been reserved by defendant in its answer, may on appeal be argued by defendant and considered in appellate court.—*Union Nat. Bank v. United States Fidelity & Guaranty Co.*, 329.

Where plaintiff in a petitory suit alone appealed, and defendant and the warrantor did not pray for an amendment, the judgment against them or either of them is not reviewable.—*Delouche v. Rosenthal*, 581.

Under former decision against plaintiff company on its charge that defendants trespassed on navigable waters and streams within its grants, exception of no cause of action plead-

ed against its supplemental and amended petition, charging no other trespass, was properly sustained.—*Louisiana Navigation Co. v. Oyster Commission of La.*, 664.

In ejectment, where defendant claimed title under writ of fi. fa. issued under a judgment in a prior suit, and objection was made to introduction of writ in evidence without a judgment to support it, and objection was overruled, because going only to order of proof, but judgment was not thereafter offered, it must be presumed that there was no valid judgment authorizing sale.—*Roussel v. New Orleans Land Co.*, 1058.

#### § 10. Determination and disposition of cause.

In civil cases the court will apply law pertinent to facts and proceed to proper and final decision of all issues regardless of instructions given to jury.—*Jones v. Kansas City Southern Ry. Co.*, 307.

In view of Code Prac. art. 165, par. 4, an interlocutory order striking the call in warranty made by defendants in partition will be set aside and case remanded for trial.—*Vance v. Noel*, 477.

A civil case will not be remanded for introduction of newly discovered evidence, when failure to discover it during trial was attributable to a lack of diligence, particularly where asserted claim is stale and without equity.—*Chalmers v. Frost-Johnson Lumber Co.*, 836.

### APPLIANCES.

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**BAIL.****§ 1. In criminal prosecutions.**

Surety on appearance bond taken by a justice of the peace is not relieved because record shows no order fixing amount of bond, as no proceeding in justice court need be in writing, and as its acceptance and transmission of bond to district court showed that it was taken by order of the justice.—*State v. Lankford*, 381.

Where affidavit, made April 28, 1917, charged an offense committed on October 23, 1917, and condition of appearance bond was to answer an offense committed October 23, 1916, the error in the affidavit was merely clerical; the date therein being an impossible one, and did not relieve the surety.—*Id.*

**BANKS AND BANKING.**

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**§ 1. Control and regulation in general.**

In view of Const. art. 229, authorizing license taxes, and under Act No. 171 of 1898, § 3, par. 2. imposing banking license based on declared or nominal capital for each business, and section 30, requiring license for each place of business, the words "each business" mean "each occupation," so that bank having two branches, with same officers and capital, was only liable to one license.—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; In re *Central Bank & Trust Co.*, *Id.*

**§ 2. National banks.**

Under Rev. St. U. S. § 5209 (U. S. Comp. St. 1916, § 9772), embezzlement by officer of national bank involves a breach of trust as to moneys of bank lawfully in his possession, and a wrongful appropriation thereof to own use with intent to defraud.—*Union Nat. Bank v. United States Fidelity & Guaranty Co.*, 329.

Under Rev. St. U. S. § 5209 (U. S. Comp. St. 1916, § 9772), defining embezzlement by officers of national bank, intent to defraud need not willfully have been purpose with which act was done; it being sufficient if its natural and necessary effect was to defraud bank or others, and that it was willfully and intentionally done.—*Id.*

Under Rev. St. U. S. § 5209 (U. S. Comp. St. 1916, § 9772), embezzlement or misapplication of funds of national bank by officers without bank's knowledge or consent is not changed as to its criminal character by subsequent

knowledge of officers of bank and their implied consent thereto.—Id.

Where acts and intents of president of national bank in obtaining money for worthless securities made him guilty of embezzlement, it is immaterial that acts were committed or knowingly sanctioned by other officers of bank.—Id.

As evidence that president's overdrafts on bank were made with intent to misapply its funds, it may be shown that bank was insolvent, because its assets were worthless notes used by president in connivance with cashier and another director to give him fictitious credit.—Id.

## BAR.

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## BILLS AND NOTES.

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### § 1. Rights and liabilities on indorsement or transfer.

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Where bank sold assets to another in ignorance that two notes were forgeries, on discovery seller bank should have reimbursed

buyer bank for price paid for notes, their forged character having disconnected them from contract.—Interstate Trust & Banking Co. v. Liquidators of People's Bank & Trust Co., 574.

Where one bank bought assets of another in ignorance of fact that two notes were forgeries, if any loss resulted from act of buyer bank in renewing or extending notes, loss must fall on seller bank.—Id.

Where bank taking over assets of another agreed that, if it should renew any obligations taken over, renewal should be absolute acknowledgment that note was worth face value, with interest, etc., contract carried condition that all notes taken over were genuine.—Id.

### § 2. Payment and discharge.

Where mortgagee wrote mortgagor he had instituted proceedings against her to sell property formerly owned by her, but that he did not look to her personally for demand represented by note, and that he released her from all personal obligation, by letter mortgagor was released from obligation on note.—Bernheim v. Pessou, 609.

### § 3. Actions.

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Of sheriff or constable, see Sheriffs and Constables, § 3.

On setting aside sequestration, see Sequestration.

Prohibition against proceedings to compel giving bond for support of child, see Prohibition, § 1.

Sureties on bonds, see Suretyship.

## BOUNDARIES.

Parol or extrinsic evidence, see Evidence, § 2.

### § 1. Description.

Though it seems impossible to determine with mathematical certainty location of disputed line, plaintiffs are entitled to have limits of their property fixed under Civ. Code, art. 823.—*Russell v. Producers' Oil Co.*, 217.

### § 2. Evidence, ascertainment, and establishment.

In action in boundary, law requires proof from each of contiguous owners, and burden is divided.—*Russell v. Producers' Oil Co.*, 217.

In boundary suit involving location and ownership of oil well, evidence *held* sufficient to justify decree for plaintiffs.—*Id.*

In boundary suit, court, when not satisfied either from lack of evidence or weakness of probative force, may cause of its own motion investigation by experts to ascertain facts necessary to reach intelligent conclusion and render proper decree.—*Id.*

In petitory suit changed by manner of conducting trial into action in boundary, evidence being such that judge cannot render decision thereon, he may properly cause investigation by experts to ascertain facts.—*Id.*

## BRANCH BANKS.

See Banks and Banking, § 1.

## BREACH.

Of contract, see Contracts, § 3; Sales, § 7.  
Of covenant, see Covenants, § 1.  
Of warranty, see Insurance, § 1.

## BRIDGES.

Duties of cities as to maintenance of, see Municipal Corporations, § 6.

## BROKERS.

### § 1. Duties and liabilities to principal.

In suit for earnest money deposited with broker to bind agreement to buy plaintiff's property, the depositor, against whom plaintiff sought a forfeiture of the deposit, without a money judgment, was not a necessary party defendant.—*Maloney v. Aschaffenburg*, 509.

Broker employed to sell property and who closes agreement for its sale becomes, under Rev. Civ. Code, art. 3016, the agent of both seller and purchaser, and, where purchaser deposits earnest money, seller cannot sue broker to recover it without making purchaser a party to such suit.—*Id.*

### § 2. Compensation and lien.

Where agent procures a contract for sale of principal's property and payment of earnest money, and principal extends time for completion of sale and manifests intention to pay commission, he is liable therefor, though agreement is afterwards violated and earnest money forfeited.—*Maloney v. Aschaffenburg*, 509.

Under contract to pay commission to broker effecting sale or procuring purchaser, broker was not entitled to commissions if owner sold property without his aid long after his failure to effect a sale, though sale was to one whom broker had introduced as prospective purchaser.—*Ford v. Shaffer*, 635.

## BROTHERHOODS.

Labor unions, see Trade Unions.

## BURGLARY.

Service on accused of copy of information and list of jurors, see Criminal Law, § 12.

## CANALS.

Dedication of property to public use, see Dedication, § 1.

Determination of constitutionality of law relating to lease of canal property, see Constitutional Law, § 1.

### § 1. Establishment, construction, and maintenance.

Act No. 144 of 1888 and Act No. 60 of 1910, authorizing leases of property unnecessary to canal, *held* valid under Const. 1879, art. 180 (Const. 1913, art. 195).—*Richardson v. Liberty Oil Co.*, 130.

The New Basin Canal and Shell Road, with the strips on each side, are property of state to be administered in public interest, and where state required road to be built on west side of canal and to be kept open to public, rights as to its maintenance did not apply to strip between western edge of road and western line of canal property.—*Id.*

## CANCELLATION OF INSTRUMENTS.

See Reformation of Instruments.

Rescission of contracts for sale of lands, see Sales, § 6.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, § 1.

### § 1. Proceedings and relief.

Civ. Code, art. 3542, declaring that actions for the nullity or rescission of contracts are prescribed by five years, has no application to an action to have decreed null a contract

void on its face.—*Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 743.

## CARRIERS.

Forfeiture of sheriff's office for wrongfully receiving passes or discriminatory rates, see *Sheriffs and Constables*, § 1.

Inadequate damages in action for injuries to passenger, see *Damages*, § 3.

Validity of contract to grant pass, see *Contracts*, § 1.

### § 1. Control and regulation of common carriers.

It is against public policy and Const. art. 191, for public officers to accept or receive free passes or discriminatory rates.—*Coco v. Oden*, 718.

Under Const. art. 191, forbidding public officers to accept free passes, a free pass is one for which a full consideration is not given or paid for in the usual way and time, and at tariff rates, and is a privilege of riding over a railroad without payment of customary fare.—*Id.*

By Act No. 171 of 1908 no suit to set aside, change, or alter orders of the Railroad Commission should be entertained unless filed within three months after the order is made.—*Shreveport Window Glass Co. v. Railroad Commission of Louisiana*, 794.

The desires and dissatisfaction of a shipper with a rate rule of the Railroad Commission of the state are no grounds for abrogation of the rule.—*Id.*

In any change that may be demanded to be made in its rules the Railroad Commission has a real interest that may serve as a basis for it to stand in judgment, but in a question of the proper interpretation of its former rules, whether separately or in conjunction with any judgment, the commission is without interest, and the question is moot.—*Id.*

No law confers on the courts appellate jurisdiction over rulings of the Railroad Commission fixing rates.—*Id.*

Presumption is that Railroad Commission acted justly as to all parties concerned in adopting a milling in transit and rate order, and courts will not interfere without clear evidence that a party's legal rights have been invaded, or that rate is unreasonable, discriminatory, or extortionate.—*Empire Rice Milling Co. v. Railroad Commission of Louisiana*, 1036.

Courts of the state have jurisdiction to entertain a complaint of a party in interest that any rate, classification, order, etc., adopted by Railroad Commission is beyond its power or is unreasonable, discriminatory, or extortionate.—*Id.*

Milling in transit is a burden placed on the railroads, and the validity of such a rule of the Railroad Commission may be contested by the railroads.—*Id.*

The obligation of milling in transit cannot be contested by any other person than the railroads upon which it is placed.—*Id.*

The Louisiana Railroad Commission is established by the state Constitution and given certain powers of authority over railroads, steamboats, water craft, sleeping car, freight, and passenger tariffs and services, and express and telephone charges.—*Id.*

Milling in transit is not an unusual privilege granted by railroads to their patrons, and it is not unusual or unjust for the Railroad Commission to impose such an obligation upon railroads if the rates are compensatory for the additional burden.—*Id.*

To ascertain what constitutes a just and reasonable rate, two fundamental principles must be considered, the right of the carrier to a fair return to its investment, and the right of the public to be charged no more than reasonable value of the services.—*Alexandria & W. Ry. Co. v. Railroad Commission of Louisiana*, 1067.

In determining reasonableness of rate fixed by legislative authority on particular commodity, proper test is not whether as to that commodity the rate gives carrier fair compensation after legitimate expenses, but whether on its total freight receipts it can earn enough over operating expenses to give fair and reasonable profit upon its investment.—*Id.*

Order of Railroad Commission fixing rate on lumber and other commodities, taking rate on lumber at 3 cents per 100 pounds, limiting maximum loads to 30,000 pounds, between points 11 miles apart on plaintiff's road, allowing a margin of only 22 mills over actual cost of transportation, *held*, on the evidence, unreasonable and unjust.—*Id.*

### § 2. Carriage of passengers.

Common carriers must exercise the strictest diligence in setting down a passenger as safely as means of conveyance and circumstances will permit, which duty is more incumbent upon it when conveyance is stopped at unusual and dangerous place.—*Clogher v. New Orleans Ry. & Light Co.*, 85.

It is not negligent for street car company to stop its car either short of or beyond regular stopping place, if place where car is stopped is not precisely similar to that at regular stopping place.—*Id.*

Where street car stopped 15 or 20 feet beyond its usual stopping place at place where step of car was 15½ or 16 inches above roadway, so that passenger might safely alight by extending foot 7 inches out and stepping down while holding onto handlebar, such place was reasonably safe.—*Id.*

## CERTAINTY.

Of contract of sale, see *Sales*, § 1.



## CERTIFICATE.

Receivers' certificate, see Public Lands, § 2.

## CERTIORARI.

Jurisdiction of supreme court to issue, see Courts, § 2.

### § 1. Nature and grounds.

Supreme Court cannot undertake to review by certiorari granting of new trials.—New Orleans Silica Brick Co. v. John Thatcher & Son, 442; In re New Orleans Silica Brick Co., Id.

Relator should have exhausted his remedies for relief in trial court before obtaining writs of certiorari against judge of juvenile court ordering him to give a guaranty bond to pay monthly sum for support of relator's child and in default of bond to be held for further orders of the court, etc.—State v. Clark, 481.

A writ of certiorari will not issue to judge of juvenile court, where defendant was ordered to pay alimony to his child, to furnish a guaranty, or conditional bond, and in default in furnishing such bond to be held for further orders of the court.—Id.

### § 2. Proceedings and determination.

The informality of applying for a writ of certiorari directly in the name of the applicant, instead of in the name of the state, is not fatal, where the petition otherwise discloses a right to the writ.—Davenport v. Sterling Lumber Co., 671; In re Davenport, Id.

Where defendant, who appealed to district court, acquiesced in its judgment overruling appellee's motion to dismiss appeal and does not ask any relief on appellee's certiorari, Supreme Court need not consider correctness of rejecting defendant's demand that suit be dismissed because abandoned.—Reagan v. Louisiana Western R. Co., 754; In re Reagan, Id.

## CHAMPERTY AND MAINTENANCE.

See Litigious Rights.

## CHARTER.

Of labor union, see Trade Unions.

## CHILDREN.

See Minors; Parent and Child.

Contributory negligence of, see Negligence, § 2.

Injuries from escaping gas, see Gas.

Injuries to children on streets, see Municipal Corporations, § 5.

Liability of city for drowning of child in ditch, see Municipal Corporations, § 6.

Negligence in general causing death of child, see Negligence, § 1.

## CITATION.

Where opposition to receiver's account was dismissed, opponent taking a devolutive appeal, held entitled under Supreme Court rule 1, § 8 (67 South. vii, 136 La. viii), to a suspension of proceedings to afford him a reasonable time to cite the necessary parties.—Garsaud v. Mandeville Light & Ice Co., 563.

In view of R. S. § 3629, and Code Prac. arts. 182, 192, a citation and notice of seizure in a suit against husband and wife served on husband alone was not a good service, where she was sued for his debt, and made no appearance and received no notice of judgment.—Whiteside v. Lafayette Fire Ins. Co., 675.

Citation is not "process" within the meaning of Const. art. 90, providing that "the style of all process shall be 'the state of Louisiana,'"—Herndon v. Wakefield-Moore Realty Co., 724; Wakefield-Moore Realty Co. v. Herndon, Id.

Where citation in ejectment proceedings summoned defendant in name of state of Louisiana and of First judicial district court of parish of Caddo, exception on ground citation had not been issued in name of state, in accordance with Code Prac. art. 774, and Const. art. 90, was properly overruled; citation complying with Code Prac. art. 179.—Id.

Code Prac. art. 198, applies to ordinary partnerships, as well as commercial partnerships, so that service of citation, as therein prescribed, "on any of the partners in person, or, at their store or counting house, by delivery to their clerk or agent," is sufficient to support judgment against an ordinary partnership.—Victor Cornille & De Blonde v. R. G. Dun & Co., 1045.

## CITIES.

See Municipal Corporations.

## CITIZENS.

Equal protection of laws, see Constitutional Law, § 5.

## CIVIL RIGHTS.

See Constitutional Law, § 5.

## CODICIL

See Wills, § 3.

## COLLATERAL AGREEMENT.

Parol evidence, see Evidence, § 2.

## COLLATERAL ATTACK.

On judgment, see Judgment, § 4.

**COLLATION.**

By legatees, see Wills, § 3.  
Request for by way of opposition to homologation of partition proceedings, see Partition, § 1.

**COLLECTION.**

Of taxes, see Taxation, § 6.

**COLONIAL GRANTS.**

See Public Lands, § 8.

**COLOR OF TITLE.**

To sustain prescription, see Prescription, § 4.

**COMITY.**

Between courts, see Courts, § 3.

**COMMERCE.**

Carriage of goods and passengers, see Carriers.

**COMMERCIAL PAPER.**

See Bills and Notes.

**COMMISSION.**

Railroad commission, see Carriers, § 1; Public Service Commissions; Railroads, § 1; mandamus to control acts of, see Mandamus, § 2; supervisory jurisdiction of supreme court, see Courts, § 2.

**COMMISSIONS.**

Of brokers, see Brokers, § 2.

**COMMON CARRIERS.**

See Carriers.

**COMMON LAW.**

Crimes, see Criminal Law, § 2; Homicide, §§ 1, 2.

Form of indictment, see Indictment and Information, § 1.

**COMMON SCHOOLS.**

See Schools and School Districts, § 1.

**COMMUNITY PROPERTY.**

See Husband and Wife, § 5.

**COMPENSATION.**

For services, see Master and Servant, § 2.  
Of brokers, see Brokers, § 2.  
Of physician, see Physicians and Surgeons.  
Workmen's Compensation Act, see Master and Servant, § 5.

**COMPUTATION.**

Of period of prescription, see Prescription, § 3.

**CONCLUSION.**

In pleading, see Pleading, § 1.

**CONDITIONS.**

In wills, see Wills, § 3.

**CONDONATION.**

Of ground for divorce, see Divorce and Separation from Bed and Board, § 1.

**CONFESSION.**

Of judgment, see Judgment, § 2.

**CONFLICTING JURISDICTION.**

See Courts, § 3.

**CONFLICT OF LAWS.**

Capacity of married woman to contract, see Husband and Wife, § 3.  
Conflicting jurisdiction of courts, see Courts, § 3.

**CONSIDERATION.**

Of contract in general, see Contracts, § 1.

**CONSPIRACY.**

Between heirs to exclude coheir from right of succession, see Succession, § 2.

**CONSTITUTIONAL LAW.**

Jurisdiction of constitutional questions, see Courts, § 2.

*Provisions relating to particular subjects.*

See Banks and Banking, § 1; Carriers, § 1; Courts, § 3; Escheat; Homestead, § 1; Judg-

ment, § 6; Levees; Master and Servant, §§ 1, 5; Minors, § 1; Officers, § 1; Slaves; State, § 1.  
Subjects and titles of statutes, see Statutes, § 1.

### § 1. Construction, operation, and enforcement of constitutional provisions.

The legislative and executive branches having for 30 years permissibly interpreted Const. 1879, art. 180 (Const. 1913, art. 195), prohibiting alienation or leasing of "New Basin Canal and Shell Road and their appurtenances," as applying to such property as a whole and as inapplicable to lease of property unnecessary to canal, Act No. 144 of 1888 and Act No. 60 of 1910, authorizing such leases, are constitutional.—*Richardson v. Liberty Oil Co.*, 130.

In the construction of Constitutions, a court is not bound by a literal interpretation, where it would lead to an absurdity, or to a plain violation of the spirit and purpose of the enactment.—*State v. Joseph*, 428.

### § 2. Vested rights.

Act No. 269 of 1916, allowing divorce to married persons living apart for seven years or more, construed as referring to separation for that time, regardless of date of its passage, does not divest vested rights.—*Hava v. Chavigny*, 365.

An ordinance, prescribing penalty for operation of a house of prostitution, an offense does not divest one prosecuted thereunder of any vested rights in the real property which she owns and occupies.—*City of New Orleans v. White*, 487.

### § 3. Obligation of contracts.

Act No. 269 of 1916, allowing divorce to married persons living apart for seven years or more, construed as referring to separation for that time, regardless of date of its passage, does not impair the obligations of contract of marriage.—*Hava v. Chavigny*, 365.

An ordinance prescribing penalty for operating a house of prostitution does not impair the obligation of a contract.—*City of New Orleans v. White*, 487.

### § 4. Retrospective and ex post facto laws.

Act No. 269 of 1916, allowing divorce to married persons living apart for seven years or more, construed as referring to separation for that time, regardless of date of its passage, is not an ex post facto law, forbidden by Const. art. 166.—*Hava v. Chavigny*, 365.

### § 5. Equal protection of laws.

Ordinance making it an offense to operate a house of prostitution and providing a penalty therefor, was not unreasonable, harsh, and discriminating so as to deny the accused equal

protection of the laws in violation of state and federal Constitutions.—*City of New Orleans v. White*, 487.

Act No. 187 of 1912 in reference to defense in employes' suits for personal injury, applying only to public service corporations, is violative of Constitutions of Louisiana and United States, in that it denied equal protection of the laws.—*Mason v. New Orleans Terminal Co.*, 616.

### § 6. Due process of law.

The proceeding by affidavit against a person, charged with having committed an offense, is due process of law.—*City of New Orleans v. White*, 487.

## CONSTRUCTION.

Of acts of sale, see Sales, § 11.  
Of constitution, see Constitutional Law, § 1.  
Of contracts for sale of immovables, see Sales, § 5.  
Of contracts in general, see Contracts, § 2.  
Of pleadings, see Pleading, § 1.  
Of statutes, see Statutes, § 3.  
Of wills, see Wills, § 3.

## CONTEST.

Of will, see Wills, § 2.

## CONTINUANCE.

In criminal prosecutions, see Criminal Law, § 11.  
Review of rulings in criminal prosecution, see Criminal Law, § 14.

## CONTRACTS.

See Litigious Rights.  
Agreements within statute of frauds, see Frauds, Statute of.  
Cancellation, see Cancellation of Instruments.  
Damages for breach, see Damages, § 1.  
Impairing obligation, see Constitutional Law, § 3.  
Liquidated damages or penalties, see Damages, § 2.  
Parol or extrinsic evidence, see Evidence, § 2.  
Prescription of actions in general, see Prescription, § 2.  
Reformation, see Reformation of Instruments.

### Contracts of particular classes of persons.

See Husband and Wife, §§ 1-3; Municipal Corporations, § 3.

### Contracts relating to particular subjects.

Creation of trust, see Trusts, § 1.  
Traffic contracts between railroads, see Railroads, § 2.

*Particular classes of express contracts.*

See Bills and Notes; Covenants; Mandate; Partnership; Sales.

Insurance policies, see Insurance.

Leases, see Landlord and Tenant.

Suretyship, see Suretyship.

**§ 1. Requisites and validity.**

Contracting parties may make any stipulations material to contract, although such stipulations may seem to be of little or no value to either party.—*Bank of Cotton Valley v. McInnis*, 436.

Contract by sheriff to perform legal services in suits in which railroad was a party in exchange for a free pass is contrary to morals, public policy, and Const. art. 191, and void.—*Coco v. Oden*, 718.

Baker's accepted proposition to deliver bread required by grocer for one year at certain price per loaf, the grocer to supply standing orders subject to revision on due notice, was not objectionable for lack of mutuality.—*Nelson v. Barber*, 783.

By including, in baker's contract to supply for a year bread required for grocer's stores, clause that grocer might sell another make of bread at not less than certain price, contract was rendered invalid for lack of mutuality; such added clause leaving grocer free to determine whether he would take any bread from such baker.—*Id.*

**§ 2. Construction and operation.**

Language of contract controls where it is plain, but not where from contract as whole and circumstances surrounding it language imports meaning manifestly not intended.—*Interstate Trust & Banking Co. v. Liquidators of People's Bank & Trust Co.*, 574.

**§ 3. Actions for breach.**

In action by grocery company against bank and planting and manufacturing company upon oral contract between them for amount of supplies furnished manufacturing company in excess of its security under the contract, evidence held to sustain a verdict for plaintiff.—*Iberville Wholesale Grocery Co. v. People's Bank*, 278.

**CONTRADICTION.**

Of record, see Appeal, § 6.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, § 2.

Of deceased, see Death, § 1.

**CONVERSION.**

Tortious conversion of personal property, see Trover and Conversion.

**CONVEYANCES.**

See Mortgages.

Acts of sale, see Sales, § 11.

By or to corporations, see Corporations, § 2.

By or to husband and wife, see Husband and Wife, § 1.

By or to minors, see Minors, § 2.

By sheriffs, see Execution, § 1.

In fraud of creditors, see Fraudulent Conveyances.

Of mineral rights, see Mines and Minerals, § 1.

**CO-OWNERS.**

See Tenancy in Common.

**CORPORATIONS.**

See Carriers.

Prescription of action by corporation against manager, see Prescription, § 2.

Taxation of corporations and corporate property, see Taxation, § 2.

*Particular classes of corporations.*

See Municipal Corporations; Railroads; Street Railroads.

Banks, see Banks and Banking.

Gas companies, see Gas.

Insurance companies, see Insurance.

Telegraph and telephone companies, see Telegraphs and Telephones.

**§ 1. Corporate name, seal, domicile, by-laws, and records.**

A title guarantee corporation, the name of which is the Title & Mortgage Guarantee Company, Limited, could not, under Act No. 267 of Acts 1914, enjoin another company engaged in the same business and known as the Louisiana Abstract & Title Guarantee Company from using the phrase "Title Guarantee Company" in its name, on the ground that it has a proprietary interest in such descriptive words.—*Title & Mortgage Guarantee Co. v. Louisiana Abstract & Title Guarantee Co.*, 894.

**§ 2. Corporate powers and liabilities.**

When a corporation authorized its president to sell a right of way to another company, since a "right of way" is a mere servitude, the president could sell a servitude only, and not the land itself.—*Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 743.

Instrument whereby mining company by its president purported to convey land to canal company was null on face, in so far as it purported to convey anything more than right of way; directorate of mining company having authorized president to sell only right of way, and the resolution being attached to the instrument.—*Id.*

## CORRECTION.

Of assessment of taxes, see Taxation, § 4.  
Of record on appeal, see Appeal, § 6.

## COSTS.

Payment on taking appeal, see Appeal, § 4.

### § 1. In criminal prosecutions.

Mayor of a village, ex officio judge of the mayor's court, has authority to condemn a person, convicted of violation of a municipal ordinance, to pay costs of prosecution, in addition to fine.—*Village of Cedar Grove v. Bartmess*, 295.

## COTENANCY.

See Tenancy in Common.

## COURT OF APPEAL

See Courts, §§ 2, 3:

## COURTS.

Jurisdiction of proceedings to determine rates of carriers, see Carriers, § 1.

Jurisdiction of suit for alimony, see Divorce and Separation from Bed and Board, § 3.

Justices' courts, see Justices of the Peace.

Prohibition against proceedings in inferior courts, see Prohibition.

Review of decisions in general, see Appeal.

Review of decisions of railroad commission, see Public Service Commissions.

### § 1. Establishment, organization, and procedure in general.

Under section 9 of rule 8 of rules of civil district court for the parish of Orleans, a suit to restrain a seizure under a judgment in division A of a fund held under orders of judge of division E, in suit between same parties, is within jurisdiction of division E, if plaintiff in injunction does not dispute judgment in division A, but merely disputes right of creditor to contest title to fund held in division E.—*Firemen's Ins. Co. v. Hava*, 254; *Hava v. Lavaudais*, Id.

State courts are bound under rulings of Supreme court of United States to fix compensation to beneficiaries of deceased employé under federal Employers' Liability Act at present or cash value of what employé might reasonably have contributed to their support during his life expectancy.—*Jones v. Kansas City Southern Ry. Co.*, 307.

### § 2. Courts of appellate jurisdiction.

Where nature of particular business sought to be taxed is proven, and only question is whether it is subject to license tax, case involves legality of tax, and under Const. art. 85,

Supreme Court alone has appellate jurisdiction, regardless of amount involved.—*State ex rel. Brittain v. Hayes*, 39.

Where plaintiff sought damages of \$2,950 and excepted to dismissal of \$1,000 of such claim and his wife subsequently intervened and demanded \$1,000 and adopted allegations of husband's petition, and demands of plaintiff and intervener were rejected in one verdict and judgment, amount involved exceeded \$2,000, and appeal would not be dismissed.—*Sandlin v. Coyle*, 121.

Supreme Court could have jurisdiction of appeal from judgment of city criminal court, convicting defendant of violation of ordinance of sewerage and water board of city of New Orleans, and fining her \$20, only on hypothesis that appeal involved legality of fine imposed by municipal corporation.—*State v. Servat*, 175.

Where plaintiff in original petition claimed \$258 and amount under annuity which, measured by her life expectancy, amounted to \$1,644, Supreme Court has appellate jurisdiction.—*Marks v. Loewenberg*, 196.

Where adjudicated heirs ruled a bank to show cause why it should not pay over \$736.50 owned by deceased, which it paid into court, and deceased's surviving husband on intervention questioned the legitimacy of heirs and obtained judgment, on which question the Supreme Court alone had jurisdiction, the judgment was appealable under Const. art. 85.—*Succession of Mingo*, 298; *Delpit v. Canal Bank & Trust Co., Id.*

Suit involving constitutionality of local assessment, though amount sued for is less than \$2,000, is within Supreme Court's jurisdiction, under Const. art. 85, giving it jurisdiction of all cases in which constitutionality or legality of a tax, toll, or impost is in contestation, regardless of amount involved.—*Town of Winnfield v. Collins*, 493.

Const. art. 85, giving Supreme Court jurisdiction of suits involving alimony, is a general law which must yield to article 118, providing that appeals from juvenile court shall be allowed on matters of law only.—*State v. Edrington*, 504.

Parent's mandamus suit to compel school board to admit his children to public school involves only a civil or political right, and is not within jurisdiction of Supreme Court if the right in contest does not exceed \$2,000 in value.—*Billiot v. Terrebonne Parish School Board*, 623.

Where appellate jurisdiction of Louisiana Supreme Court depends on amount involved, it will be determined by the circumstances disclosed by the record, rather than by allegations of litigants.—*Wunderlich v. New Orleans Ry. & Light Co.*, 626.

When amount sued for, reduced by abandonment of a claim for punitive damages, leaves the amount in dispute less than \$2,000, but

within jurisdiction of the Court of Appeal, the Supreme Court, under Act No. 19 of 1912, will transfer the cause to that court.—*Southern Scrap Material Co. v. Liquidating Com'rs of Carondelet Canal & Navigation Co.*, 647.

The Supreme Court is without jurisdiction in a criminal case where a law of the state has been declared to be constitutional.—*State v. Breaux*, 653.

Where the emoluments of a sheriff's office for an unexpired term amounted to over \$2,000, as fixed by statute, Supreme Court had jurisdiction of Attorney General's appeal from a judgment refusing to forfeit and vacate sheriff's office.—*Coco v. Oden*, 718.

Where the amount of a license tax depends on the construction of revenue statute, the legality of tax is in contestation, and an appeal lies from court of first instance directly to Supreme Court.—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; *In re Central Bank & Trust Co.*, Id.

In suit to set aside order of Railroad Commission, wherein injunction obtained by commission was set aside on a bond, and it made no demand on trial judge to vacate order of dissolution, or any attempt to suspend execution of order by suspensive appeal, its application to Supreme Court for supervisory writs of certiorari and prohibition will be denied.—*Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 1090; *In re Railroad Commission of Louisiana*, Id.

In suit to set aside order of Railroad Commission, wherein an injunction, obtained by commission, was set aside, and it applied for writs of certiorari and prohibition, validity of order can be passed upon only by virtue of Supreme Court's jurisdiction on appeal in regular course.—Id.

In suit to have a municipal election declared void, and in the alternative that plaintiff be decreed mayor, without allegation of evidence of amount involved, and where salary of mayor could not be over \$2,000, the Supreme Court was without jurisdiction of plaintiff's appeal.—*Williamson v. Cridelle*, 1098.

### § 3. Concurrent and conflicting jurisdiction, and comity.

As to their claims against a corporation in receivership, nonresident, as well as resident stockholders and creditors, under Code Prac. arts. 126, 393, 397, and 165, are within jurisdiction of court appointing the receiver.—*In re Receivership of Cotton Queen Oil Co.*, 1; *Intervention and Opposition of Grigsby*, Id.

A criminal court actually in exercise of its constitutional jurisdiction cannot be ousted thereof by an order of a civil court possessing no supervisory control over it.—*Osborn v. City of Shreveport*, 932.

In case involving legality of a tax, beyond jurisdiction of Court of Appeal, but where its

want of jurisdiction was not raised, Supreme Court, in view of subsequent act (Act No. 19 of 1912), and under Const. art. 101, would not dismiss, but would order cause transferred from Court of Appeal to Supreme Court, avoid its judgment and render judgment which should have been rendered.—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; *In re Central Bank & Trust Co.*, Id.

## COVENANTS.

### § 1. Performance or breach.

Under Civ. Code, arts. 2517, 2518, owners of real property who are disturbed in possession thereof may call their vendors in warranty.—*Vance v. Noel*, 477.

Although a partition proceeding may be summary, under Civ. Code, art. 1328, defendant has a right to call his vendors in warranty when his possession of the entire property is disturbed.—Id.

## COVERTURE.

See Husband and Wife.

## CREDITORS.

See Fraudulent Conveyances.

Of intestate, see Succession, § 2.  
Remedies against surety, see Suretyship, § 2.

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see Fraudulent Conveyances, § 1.

## CRIMINAL LAW.

### § 1. Constitutional and statutory provisions and ordinances.

Section 1 of an ordinance declaring it unlawful to operate a house of prostitution, being plain and legal, with a penalty provided by section 6, one condemned under section 1 cannot sustain an objection of illegality to whole ordinance, on ground that other sections are illegal.—*City of New Orleans v. White*, 487.

An ordinance, prescribing penalty for operation of a house of prostitution, does not divest one prosecuted thereunder of any vested rights in the real property which she owns and occupies.—Id.

An ordinance prescribing penalty for operating a house of prostitution does not impair the obligation of a contract.—Id.

Ordinance making it an offense to operate a house of prostitution and providing a penalty therefor, was not unreasonable, harsh, and discriminating so as to deny the accused equal

protection of the laws in violation of state and federal Constitutions.—*Id.*

The proceeding by affidavit against a person, charged with having committed an offense, is due process of law.—*Id.*

The law does not require that ordinances should grade misdemeanors or minor offenses.—*Id.*

Title to Act No. 31 of 1886, defining disturbances of the peace in public streets and on highways or near private houses, etc., held to express the object embraced in the act.—*State v. Penten*, 589; *In re Penten*, *Id.*

Municipal authority to prohibit location and maintenance of establishments where any unwholesome business is carried on and to restrict them within certain limits includes authority to prohibit undertaking business on residence street, where not theretofore conducted.—*Osborn v. City of Shreveport*, 932.

Without any prohibitive ordinance, an undertaker may be prevented from establishing his business among residences where such business has not theretofore been conducted.—*Id.*

## **§ 2. Nature and elements of crime and defenses in general.**

No common-law crimes exist in Louisiana, nothing being a crime which is not so by statute.—*State v. Robinson*, 543.

## **§ 3. Bail.**

Surety on appearance bond taken by a justice of the peace is not relieved because record shows no order fixing amount of bond, as no proceeding in justice court need be in writing, and as its acceptance and transmission of bond to district court showed that it was taken by order of the justice.—*State v. Lankford*, 381.

Where affidavit, made April 28, 1917, charged an offense committed on October 23, 1917, and condition of appearance bond was to answer an offense committed October 23, 1916, the error in the affidavit was merely clerical; the date therein being an impossible one, and did not relieve the surety.—*Id.*

## **§ 4. Jury.**

Where five names were successively drawn from venire box, and five jurors successively called, but they failed to appear, and judge recessed over to afternoon, names which had been taken out of box had to be restored.—*State v. Harrison*, 387.

Neither Constitution nor statutes require that 300 names shall be placed at one time in general venire box after it is once so filled; the requirement being only that names shall be supplemented to keep 300 names there from one session of court to another.—*State v. Joseph*, 428.

## **§ 5. Grand jury.**

Where the grand jury on investigating a charge of murder by a policeman returned "not a true bill," its return was *prima facie* evidence

that the policeman did not commit a crime.—*Jones v. City of New Orleans*, 1073.

## **§ 6. Indictment and information.**

Under Rev. St. § 1047, trial judge, on motion of district attorney, may order change in names of victim and one accused of murder, if he finds the change was not prejudicial to defendant, provided change is not made as to identity of such parties.—*State v. Grimms*, 421.

An indictment should not be held invalid or insufficient for stating incorrectly the date of the alleged crime, if the date or time be not of the essence of the offense.—*State v. Williams*, 424.

Authority to amend an indictment, where permissible, is not confined to the grand jury, and the trial judge may order an indictment amended during the trial in the particulars mentioned in Rev. St. § 1063, on motion of district attorney.—*Id.*

Where information for keeping blind tiger, as defined by Act No. 8 (Ex. Sess.) of 1915, § 1, sets out keeping of place in prohibition territory where liquor was kept for sale, exchange, or habitual gift, defendant was not entitled to bill of particulars showing intent not to charge a keeping, etc., in connection with a business, or specifying brands of liquors.—*State v. Maggiore*, 463.

Though common-law form of indictment for murder is good under Louisiana law, if short form of indictment, provided by Rev. St. § 1048 is used, it must be strictly adhered to, and word "willfully" employed.—*State v. Robinson*, 543.

## **§ 7. Jurisdiction.**

In view of Const. art. 118, §§ 2, 3, a person over 17 years of age must be charged and tried in the district court, although at the time of the commission of the criminal offense he may have been under 17 years of age.—*State v. Ebarbo*, 591.

A criminal court actually in exercise of its constitutional jurisdiction cannot be ousted thereof by an order of a civil court possessing no supervisory control over it.—*Osborn v. City of Shreveport*, 932.

## **§ 8. Venue.**

When intoxicating liquors are delivered for shipment, or when they are received for shipment to be carried into dry territory, the violation of Act No. 23 of 1915 (Ex. Sess.) is committed in the place of the shipment.—*State v. Lieber*, 158; *In re State ex rel. Ellis*, *Id.*

When intoxicating liquors are "carried" into dry territory, the violation of Act No. 23 of 1915 (Ex. Sess.) p. 51, making the carrying of intoxicating liquors into dry territory an offense, is committed in the dry territory.—*Id.*

All trials shall take place in the parish in which the offense was committed, unless the venue is changed.—*Id.*

### § 9. Former jeopardy.

Where an information charged a maiming on January 17, 1917, defendant's plea of autrefois acquit, based on his acquittal of the same offense, charged to have been committed on January 20, 1917, it being admitted there was only one offense, was properly maintained.—State v. Schiro, 841.

### § 10. Witnesses and evidence.

The rule of evidence forbidding leading questions must yield to the discretion of the trial judge in the examination of a very young or timid witness.—State v. Williams, 424.

Objections to district attorney's cross-examination of defendant's witness were without merit, where it was as to a matter as to which he had testified for the defense.—Id.

### § 11. Time of trial and continuance.

In view of Rev. St. § 1047, a ruling refusing a defendant a delay to enable him to prepare his defense against charge of murder, shown by the evidence to have been committed at a date earlier than that alleged in the indictment, cannot be sustained.—State v. Barnhart, 596.

Trial court held not to have abused discretion in denying motion for continuance to enable defendant's counsel to investigate circumstances of crime and alleged conspiracy to implicate defendant.—State v. Gilliard, 604.

### § 12. Trial.

Where defendant testified that he fired two shots, killing two men, it was permissible for district attorney to argue that such killing was evidence of malice on the part of defendant on trial for murder of one of them.—State v. Grimms, 421.

District attorney's statement that he never prosecuted cases that were without merit, and that he selected the strongest cases to prosecute, was objectionable as attempting to impress the jury with his own opinion as to guilt.—State v. Harper, 534.

Where trial judge told jury to pay no attention to irrelevant remarks of the district attorney in argument, and it was not likely that it influenced the jury, the error would be disregarded.—Id.

Rev. St. § 992, requiring that person indicted for crime that is "punishable with imprisonment at hard labor for seven years or upwards" shall have copy of bill of information and list of jurors served upon him, does not mean minimum punishment, but any offense which might be so punishable, and includes bill of information for burglary and larceny, though punishment might in court's discretion be less than seven years.—State v. Culbertson, 565.

A prosecuting officer is entitled to form, and to express to the jury in a criminal case, his own opinion as to what has been made evident on the trial; it being for the trial judge to de-

termine whether he keeps within the record.—State v. Barnhart, 596.

### § 13. Motions for new trial and in arrest.

Where, after all names in venire box had been drawn, it was discovered that names of jurors serving on other juries in morning had not been put back into box, which was immediately done, and drawing proceeded with, defendant not objecting, his objection in motion for new trial came too late.—State v. Harrison, 387.

### § 14. Appeal, certiorari, injunction, and prohibition.

Though opening of court with prayer by judge is not usual, in absence of petitions of the prayer showing prejudice or injury, it is not cause for setting aside verdict of guilty and sentence.—State v. Shoemaker, 65.

Though immaterial evidence should not go to jury, court will accept trial judge's finding that evidence was material, unless it is clearly shown to be immaterial; the appellate court not being in as good a position as the trial court, to rule upon the point.—Id.

The Supreme Court will not set aside verdict approved by trial judge for improper remarks by the district attorney, unless clearly convinced the jury was influenced.—Id.

Supreme Court could have jurisdiction of appeal from judgment of city criminal court, convicting defendant of violation of ordinance of sewerage and water board of city of New Orleans, and fining her \$20, only on hypothesis that appeal involved legality of fine imposed by municipal corporation.—State v. Servat, 175.

A bill of exception to the overruling of defendant's objection that the district attorney's question to the prosecuting witness was leading was without merit, where the bill did not show that witness answered.—State v. Williams, 424.

Under Const. art. 117, the failure of the judge to impanel a grand jury at the expiration of six months does not, of itself, call for the reversal of a conviction; the statute providing that a grand jury, once impaneled, remains in office until succeeding jury is impaneled.—State v. Joseph, 428.

Where defendant filed in Supreme Court a purported certified copy of an internal revenue license paid by him, it could not be considered where not referred to in transcript.—State v. Maggiore, 463.

Relator should have exhausted his remedies for relief in trial court before obtaining certiorari or prohibition against judge of juvenile court, ordering him to give a guaranty bond to pay monthly sum for support of relator's child, and in default of bond to be held for further orders of the court, etc.—State v. Clark, 481.

A writ of certiorari or of prohibition will not issue to judge of juvenile court, where defend-



ant was ordered to pay alimony to his child, to furnish a guaranty, or conditional bond, and in default in furnishing such bond to be held for further orders of the court.—Id.

Under Const. art. 85, Supreme Court has no jurisdiction on appeal from a sentence imposing a fine of \$250 and imprisonment for six months and upon failure to pay the fine three months' additional imprisonment, as more than six months' imprisonment was not "actually imposed."—State v. Desimone, 505.

Trial court's discretion in refusing continuance for absence of attorneys can only be reviewed upon knowledge of circumstances and of reasons for ruling, which can be brought up only by a formal bill of exceptions, and allowing trial judge to submit a statement per curiam.—State v. Harper, 534.

Without knowing what testimony was sought to be impeached or contradicted, the Supreme Court cannot say that the trial judge erred in excluding impeaching testimony.—Id.

Defendant's bill of exception to charge defining murder, which did not show that trial judge was informed when exception was taken in what respect his definition was held to be defective, was itself defective.—State v. Robinson, 543.

Recitals in bill of exceptions that district attorney stated that a certain fact was evident does not enable court to determine whether fact was evident, and, in absence of entire record, including the evidence, trial judge's statement that district attorney kept within the record is conclusive.—State v. Barnhart, 596.

A ruling sustaining an objection to a question, on cross-examination, of a state witness in a criminal case, may be erroneous, and yet not show such prejudice to defendant's rights as to warrant the setting aside of the conviction.—Id.

Because trial judges have better opportunities than Supreme Court to know when continuance or postponement should be allowed, Supreme Court is reluctant to interfere with their discretion in the matter.—State v. Gilliard, 604.

Where brief of Attorney General on appeal by state from judgment quashing information acknowledges trial court's ruling to be right, judgment will be affirmed.—State v. Hightower, 652.

The Supreme Court is without jurisdiction in a criminal case where a law of the state has been declared to be constitutional.—State v. Breaux, 653.

The Supreme Court has no appellate jurisdiction in criminal cases where a fine exceeding \$300 or imprisonment exceeding six months has not been imposed.—Id.

Where neither statements per curiam made part of trial bill of exceptions nor return of trial judge to rule nisi challenged statement of facts set out in motion for new trial made a

part of signed bill reserved to its overruling, the facts therein alleged are taken as conceded.—State v. Block, 766; In re Block, Id.; State v. Lark, 771; In re Lark, Id.

Before a criminal or a civil court has jurisdiction of a case involving both an offense and a property right, possessor of property right, invaded by enforcement of penal ordinance, may obtain protection by appeal to tribunal having jurisdiction, which pending disposition may prohibit adverse litigant from taking it to criminal court.—Osborn v. City of Shreveport, 932.

Agreement not amounting to sale of house on residence street conveyed no such right to alleged purchaser as would entitle him to enjoin municipal authorities' prosecution of him for carrying on an undertaking business on such street in violation of ordinance.—Id.

#### **§ 15. Punishment and prevention of crime.**

Juvenile court, in ordering defendant in default of furnishing a guaranty bond to pay a certain sum per month for the support of his child, be held for further proceedings and orders of the court, did not impose a cruel and unusual punishment, or condemn defendant to perpetual punishment.—State v. Clark, 481.

#### **§ 16. Costs.**

Mayor of a village, ex officio judge of the mayor's court, has authority to condemn a person, convicted of violation of a municipal ordinance, to pay costs of prosecution, in addition to fine.—Village of Cedar Grove v. Bartmess, 295.

#### **§ 17. Particular offenses — Disorderly house.**

Indictment charging defendant unlawfully operated disorderly house by keeping, renting, and operating room in hotel, outside limits fixed by municipal ordinance for houses of that character, charged crime denounced by Rev. St. § 908, as amplified by Act No. 199 of 1912, § 1.—State v. Leroy, 186.

An ordinance, making it an offense to operate a house of prostitution and providing a penalty therefor, was not unconstitutional.—City of New Orleans v. White, 487.

#### **§ 18. — Embezzlement.**

Embezzlement is the fraudulent appropriation of property by person to whom such property has been intrusted, or into whose hands it has lawfully come.—Union Nat. Bank v. United States Fidelity & Guaranty Co., 329.

#### **§ 19. — Failure to support child.**

Where a parent was convicted of failing to support his minor child, and ordered to pay a certain amount per month for its support, the juvenile court's order that a guaranty bond be furnished by defendant did not exceed its authority.—State v. Clark, 481.

An order to pay alimony for the support of defendant's minor child was not a sentence, and

no appeal would lie until a sentence of fine or imprisonment, or both, had been imposed.—Id.

## § 20. — Homicide.

Where there was no proof that the one whom defendant killed had provoked the difficulty, a conversation between defendant and deceased's father offered to show that killing was without malice aforethought, but in heat of passion, *held* properly excluded.—State v. Harper, 534.

Where the evidence showed that defendant was the aggressor, evidence of the dangerous character of the deceased was inadmissible.—Id.

In prosecution for murder, court improperly charged that "aforethought," used in connection with "malice" in definition of murder, adds little, if any, to meaning of "malice" standing alone.—State v. Robinson, 543.

In prosecution for murder, instruction *held* erroneous in view of evidence, as calculated to create impression accused must have been violently assaulted in order to be in position to plead self-defense.—Id.

In prosecution for murder, judge is not required to charge as to involuntary manslaughter, a crime unknown to Louisiana law.—Id.

In prosecution for murder, instruction that where only one party enters fight armed with dangerous weapon and uses it against unarmed antagonist and kills him, slayer is not to be heard to say killing was manslaughter as done in passion, *held* erroneous as abstract, etc., in view of evidence.—Id.

Since it is not essential that an indictment for murder contain the word "willful" or "willfully," the charge defining the offense need not contain the word.—Id.

If Rev. St. § 1048, prescribing short form of indictment for murder, prohibits use of common-law form of indictment, and makes imperative use of short form, only indictment is regulated, and not court's charge describing offense, which need not contain word "willfully," as short form of indictment must.—Id.

Judge trying prosecution for murder is not required by any law to include definition of murder in his charge.—Id.

In prosecution for murder, trial judge in charging is not compelled by any statute or rule at common law to use any particular words or set of words in fulfilling his duty of giving the jury a knowledge of the law of murder.—Id.

Despite Rev. St. § 784, providing that whoever shall commit crime of willful murder, on conviction thereof, shall suffer death, charge defining offense need not use word "willful" or "willfully."—Id.

No such crime as involuntary manslaughter is known to Louisiana law, though at common law there was such a crime, punishable differently from voluntary manslaughter.—Id.

To justify killing as in self-defense, overt act of deceased person need not have amounted to felonious assault.—Id.

Despite Rev. St. § 784, providing death penalty for willful murder, indictment for murder need not use the word "willful" or "willfully."—Id.

"Aforethought" qualifying "malice" is so technical a word that it cannot be left out of an indictment for murder.—Id.

In Louisiana there are no degrees of murder, but, as at common law, only plain murder.—Id.

Crime of murder under Louisiana law is the same as at common law.—Id.

Murder, as defined at common law, is where a person of sound mind and discretion unlawfully kills any human being in the peace of the sovereign with malice aforethought, either express or implied.—Id.

In an indictment for murder committed on a certain day, time is not of the essence of the crime charged, and state is not restricted in its evidence to such day, but may show its commission at any time before indictment and within period of prescription.—State v. Barnhart, 596.

In a trial for murder, the state's evidence, showing that the offense was committed several months earlier than the date charged, was admissible, as it is not necessary to give a specific date, and as time is not of the essence of the offense.—Id.

In a prosecution for murder, evidence *held* not to show that deceased believed that he had no hope of recovery and was about to die when he accused defendants of having shot and cut him.—State v. Cutrera, 738.

The accusing declaration made by one not under oath or subject to cross-examination is inadmissible against the accused as a dying declaration, unless there is evidence showing to the satisfaction of the legal mind that accuser when making it had no hope of recovery.—Id.

Where evidence did not show that deceased when he made declaration accusing defendants was without hope of recovery, the testimony of deputy sheriff as to what deceased said shortly after his injury was inadmissible as a dying declaration.—Id.

## § 21. — Violation of Liquor laws.

Under Act No. 23 of 1915 (Ex. Sess.), denouncing certain offenses, "to deliver for shipment" and "to ship" mean the same thing.—State v. Lieber, 158; In re State ex rel. Ellis, Id.

The elements of keeping a blind tiger, as defined by Act No. 8 (Ex. Sess.) of 1915, § 1, are the keeping of a place in prohibition territory where liquor is kept for sale, exchange, or habitual gift, or for such purposes in connection with any business conducted at such place.—State v. Maggiore, 463.

One isolated sale of intoxicating liquor constitutes a violation of Rev. St. § 910, penalizing the offense of retailing intoxicating liquors without previously obtaining a license.—*State v. Minion*, 529.

Act No. 23 of 1915 (Ex. Sess.) was not intended to make it unlawful for a citizen of another state to buy intoxicating liquor in Louisiana of one legally authorized to sell it and to carry it into such other state to be used by himself and family or otherwise disposed of.—*State v. Block*, 766; *In re Block*, Id.; *State v. Lark*, 771; *In re Lark*, Id.

## CROSS-EXAMINATION.

See Witnesses, § 1.

## CROSSINGS.

Injuries at railroad crossings, see Railroads, § 3.

## CURBING.

Streets in cities, see Municipal Corporations, § 3.

## CUSTODY.

Of child, see Minors, § 1.

## DAIRYMEN.

As peddlers, see Hawkers and Peddlers.

## DAMAGES.

*Damages for particular injuries.*

See Death, § 1; Libel and Slander, § 3.

For withholding payment on insurance policy, see Insurance, § 4.

### § 1. Grounds and subjects of compensatory damages.

For a tort all damages resulting directly from the act of negligence may be recovered.—*Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 467; *In re New Orleans Terminal Co.*, Id.

For breach of contract without fault or bad faith, only those damages in contemplation of parties when making contract may be recovered.—Id.

### § 2. Liquidated damages and penalties.

In view of Civ. Code, art. 2463, payment of \$100 by party agreeing to buy cattle by weight, the price to exceed \$8,000 would be regarded, in absence of definite agreement as to purpose of payment, as a giving of earnest and as fixing liability for loss to either party for receding from agreement.—*Northcut v. Johnson*, 447.

One who has paid earnest money, under an agreement to buy another's property, and who

thereafter notifies the other party that he is not in a position to carry out his agreement, thereby forfeits the earnest money.—*Maloney v. Aschaffenburg*, 509.

### § 3. Inadequate and excessive damages.

A carpenter sustaining a bruised and strained knee, who was laid up for two months, suffering some pain and a diminished earning capacity, would be awarded \$1,500.—*Miller v. Tall Timber Co.*, 269.

In action for physical injury sustained by a female passenger on defendant's street car when it collided with another car, resulting in a nervous shock peculiar to women and some physical discomfort, a verdict of \$200 increased to \$300 on appeal.—*Favalora v. New Orleans Ry. & Light Co.*, 572.

Where injury to plaintiff's foot was not permanent, and his physical suffering was not continuous or of long duration at any time, and his detention from business was slight, and he suffered no pecuniary loss, a verdict of \$750 was adequate.—*Burke v. Werlein*, 788.

### § 4. Pleading, evidence, and assessment.

In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, evidence held not to sustain claim for damages suffered by plaintiff through illness of his wife.—*Sandlin v. Coyle*, 121.

In action by owner of plantation for damages for acts of violence driving away a tenant planting on shares, wherein the wife of owner intervened, evidence held not to support her claim for \$1,000 damages for shock, annoyance, sickness, and prolonged mental suffering.—Id.

In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, evidence held not to sustain claim for damages for vexation and humiliation.—Id.

## DATE.

Allegations in indictment as to date of crime, see Indictment and Information, § 1.

Of jurat, see Affidavits.

## DATION EN PAIEMENT.

Settlement of community liability, see Husband and Wife, § 5.

## DEATH.

Conclusions in pleading, see Pleading, § 1.

Liability in general of railroad company for causing death, see Railroads, § 3.

Master's liability for negligence causing death of servant, see Master and Servant, § 3.

Rulings of United States Supreme Court relating to federal Employers' Liability Act as binding on state courts, see Courts, § 1.

Suspension of prescription, see Prescription, § 3.

**§ 1. Actions for causing death.**

Where presence of deceased who was lying down between rails of track was unaccounted for, it would be assumed as legal conclusion that he was guilty of gross negligence amounting to recklessness.—*Rogers v. Louisiana Ry. & Nav. Co.*, 58.

Where deceased, killed while lying between rails of track, was guilty of gross negligence, his widow could recover only if she showed that accident might have been avoided by exercise of ordinary care by defendant's engineer after danger of situation was or should have been discovered.—*Id.*

Recovery under federal Employers' Liability Act, being limited to pecuniary loss to beneficiaries, is to be computed by discounting lost future benefits at fair rate at which money might be loaned or invested safely at interest for each year of life expectancy.—*Jones v. Kansas City Southern Ry. Co.*, 307.

In determining life expectancy of locomotive engineer according to expectation table constructed from American Experience Table of Mortality, court would adopt rule of insurance companies of adding eight years to age because of hazardous occupation.—*Id.*

Present value of future benefits lost by beneficiary of deceased employé under federal Employers' Liability Act is found by multiplying difference between his annual wages and annual cost of his maintenance by number of years of his life expectancy, and discounting result at 5 per cent. annually for his expectancy.—*Id.*

The jury is not required by the federal Employers' Liability Act to apportion the award of damages among the beneficiaries of the deceased employé.—*Id.*

**DEBTOR AND CREDITOR.**

See Fraudulent Conveyances.

**DECEDENTS.**

Estates, see Succession.

**DECLARATIONS.**

Dying declarations, see Homicide, § 5.

**DEDICATION.****§ 1. Nature and requisites.**

Under Act No. 18 of 1831, establishing corporation to construct a canal and road and to acquire land therefor, with authority to charge tolls and with exemption of capital stock from taxation, subject to reversion after 35 years, it was not contemplated that it might dedicate property to public use, and that property

should revert burdened with servitudes.—*Richardson v. Liberty Oil Co.*, 130.

Where land is sold by deed designating it as "Lot No. III" on plan showing it bounded by other lots whose boundaries are indicated by lines not differing from each other, purchaser acquires no greater rights on theory of dedication as to lot marked "New Orleans Canal" than as to any other lot constituting his boundary.—*Id.*

**DEEDS.**

Acts of sale in general, see Sale, § 11.

Estoppel by deed, see Estoppel, § 1.

Parol or extrinsic evidence, see Evidence, § 2.

Sheriffs' deeds, see Execution, § 1.

Of trust, see Mortgages.

**DEFAMATION.**

See Libel and Slander.

**DELIVERY.**

Of goods sold, see Sales, § 2.

**DEMAND.**

For compensation under Employers' Liability Act, see Master and Servant, § 5.

**DEPOSITIONS.**

See Affidavits; Witnesses.

**DEPUTY.**

Deputy sheriff, see Sheriffs and Constables, §§ 2, 3.

**DESCENT AND DISTRIBUTION.**

See Succession; Wills.

**DESCRIPTION.**

Of devisees or legatees in will, see Wills, § 3.

Of property conveyed, see Boundaries, § 1.

**DEVISES.**

See Wills.

**DEVOLUTIVE APPEAL.**

See Appeal, §§ 4, 8.

## DISABILITIES.

Effect on prescription, see Prescription, § 3.  
Of married women, see Husband and Wife, § 2.  
Of slaves, see Slaves.

## DISCOVERED PERIL.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 2; Railroads, § 3; Street Railroads, § 1.

## DISCRETION OF COURT.

Allowance of leading questions to witnesses, see Witnesses, § 1.  
Granting or refusing continuance in criminal prosecution, see Criminal Law, § 11.  
Mandamus to control, see Mandamus, § 1.  
Review in criminal prosecutions, see Criminal Law, § 14.  
Setting aside sequestration, see Sequestration.

## DISCRIMINATION.

By telegraph and telephone companies, see Telegraphs and Telephones, § 1.

## DISEASE.

Affecting right of recovery under Employers' Liability Act, see Master and Servant, § 5.

## DISMISSAL AND NONSUIT.

Dismissal of appeal, see Appeal, §§ 1, 4, 6, 7.  
Dismissal of appeal from justice's court, see Justices of the Peace, § 1.  
Dismissal of appeal from railroad commission, see Railroads, § 1.  
Dismissal of separation suit, see Divorce and Separation from Bed and Board, § 2.  
Transfer of cause from one court to another instead of dismissal, see Courts, § 3.

### § 1. Involuntary.

Where an exception of nonjoinder of necessary parties was filed, and plaintiff was given sufficient time to make the necessary parties defendant, but did not do so in compliance with court's order, the suit was properly dismissed as in case of nonsuit.—Succession of McMahon, 644.

## DISORDERLY CONDUCT.

Subject and title of statute, see Statutes, § 1.

## DISORDERLY HOUSE.

Due process of law, see Constitutional Law, § 2.  
Partial invalidity of ordinance regulating, see Municipal Corporations, § 1.

Indictment charging defendant unlawfully operated disorderly house by keeping, renting, and operating room in hotel, outside limits fixed by municipal ordinance for houses of that character, charged crime denounced by Rev. St. § 908, as amplified by Act No. 199 of 1912, § 1.—State v. Leroy, 186.

An ordinance, making it an offense to operate a house of prostitution and providing a penalty therefor, was not unconstitutional.—City of New Orleans v. White, 487.

## DISSOLUTION.

Of injunction, see Injunction, § 3.  
Of sequestration, see Sequestration.

## DISTRIBUTION.

Of estate of decedent, see Succession.

## DISTRICT AND PROSECUTING ATTORNEYS.

Action by to forfeit sheriff's office, see Sheriffs and Constables, § 1.  
Argument and conduct at trial, see Criminal Law, § 12.  
Equal protection of law, see Constitutional Law, § 5.  
Harmless error in remarks of, see Criminal Law, § 14.  
Impairing obligation of contract, see Constitutional Law, § 3.

## DISTRICTS.

Drainage districts, see Drains, § 1.

## DITCHES.

See Drains.

## DIVISIONS.

Of courts, see Courts, § 1.

## DIVORCE AND SEPARATION FROM BED AND BOARD.

Action for, as affecting community property rights, see Husband and Wife, § 5.  
Ex post facto laws, see Constitutional Law, § 4.  
Laws impairing obligation of contracts, see Constitutional Law, § 3.  
Laws relating to as affecting vested rights, see Constitutional Law, § 2.

### § 1. Grounds.

Act No. 269 of 1916, § 1, allowing divorce to married persons living apart for seven

years or more, refers to those living apart for that time, regardless of the date of passage and promulgation of act.—*Hava v. Chavigny*, 365.

Where general conduct of husband which might have afforded wife cause for separation from bed and board had been condoned, mere fact that he sold community property and expressed intention to sell more would not of itself constitute sufficient cause of action.—*Simon v. Meaux*, 760.

### **§ 2. Jurisdiction, proceedings, and relief.**

Under Act No. 269 of 1916, § 1, imposing no conditions other than that parties shall have lived apart for seven years or more as ground for divorce, it is not necessary for any other condition to be alleged in a petition to sustain a cause of action.—*Hava v. Chavigny*, 365.

In a wife's suit for separation, evidence held to sustain a judgment dismissing the suit for want of jurisdiction in the civil district court in that defendant's domicile was in another parish.—*Maddux v. Maddux*, 625.

A married woman may lawfully acquire a separate domicile, when the misconduct of her husband compels her to leave him, or when he abandons her.—*George v. George*, 1032; *In re George*, Id.

Where married woman acquires a domicile separate from that of her husband, there is no longer a matrimonial domicile, the courts of which possess exclusive jurisdiction of the res or marital status, and courts of domicile established by parties respectively are vested with jurisdiction.—Id.

In wife's action for divorce, etc., evidence held to sustain trial court's finding that defendant, who excepted to jurisdiction, had not shown his acquisition of a domicile elsewhere than in city of New Orleans.—Id.

### **§ 3. Alimony, allowances, and disposition of property.**

Decree condemning husband suing for separation to pay alimony in the sum of \$30 per month sustained, in view of the evidence as to his earnings and property.—*Ghisalberti v. Calamari*, 507.

The Supreme Court has jurisdiction in suits involving alimony.—Id.

## **DOCTORS.**

See Physicians and Surgeons.

## **DOCUMENTS.**

Incorporation or reference to in pleading, see Pleading, §§ 1, 5.

## **DOMICILE.**

Affecting jurisdiction of suit for divorce, see Divorce and Separation from Bed and Board, § 2.

As affecting jurisdiction of succession, see Succession, § 3.

Unless otherwise provided by law, a domicile once established is retained until another is acquired.—*George v. George*, 1032; *In re George*, Id.

## **DRAFTS.**

Forfeiture of other office by acceptance of membership in draft board, see Officers, § 1.

## **DRAINS.**

Estoppel by acts of drainage board, see Estoppel, § 2.

In cities, see Municipal Corporations, § 6. Transfer of school lands to drainage district, see Public Lands, § 1; Schools and School Districts, § 1.

### **§ 1. Establishment and maintenance.**

Under Act No. 74 of 1892, creating Caddo levee board, as amended and re-enacted by Act No. 160 of 1900, it has no authority to invade the city of Shreveport and interfere with its municipal officers in the administration of its affairs.—*City of Shreveport v. Board of Com'rs of Caddo Levee Dist.*, 778.

Act No. 61 of 1904, gives Caddo Levee Board no authority to cut new drainage channels or to divert the water falling upon a large area from its natural drain, and to carry it by a new channel through the city of Shreveport.—Id.

Land of the state, and land held by it as trustees for the public schools, was not intended to be embraced in Act No. 165 of 1858 as to formation of drainage districts, authorizing proceeding in rem without other citation than newspaper publication.—*State v. New Orleans Land Co.*, 858.

## **DUE PROCESS OF LAW.**

See Constitutional Law, § 6.

## **DYING DECLARATIONS.**

See Homicide, § 5.

## **EARNEST MONEY.**

Forfeiture of as liquidated damages, see Damages, § 2.

Recovery of money deposited with broker, see Brokers.

**EJECTMENT.**

See Petitory Action.

**ELECTION.**

Between allegations of pleading, see Pleading, § 7.

**ELECTIONS.**

Appellate jurisdiction of supreme court in proceedings to have election declared void, see Courts, § 2.

Pleading matters of evidence in election contest, see Pleading, § 1.

**§ 1. Right of suffrage and regulation thereof in general.**

A legal voter cannot be required to divulge, on or off the witness stand, for whom he voted, but an illegal voter, as a nonresident, can be required.—*Gaiennie v. Druilhet*, 662; *In re Gaiennie*, Id.

**§ 2. Conduct of election.**

An election is vitiated by fraud or illegality which affects the result, and upon such showing will be decreed void and of no effect.—*Dupuis v. Drainage Com'rs of Subdrainage Dist. No. 1 of Fifth Police Jury Ward of Acadia Parish*, 656.

**ELECTRICITY.**

Master's liability for injury to servant, see Master and Servant, § 3.

**ELECTRIC RAILROADS.**

See Street Railroads, § 1.

**EMANCIPATION.**

See Slaves.

**EMBEZZLEMENT.**

By officer of national bank, see Banks and Banking, § 2.

Embezzlement is the fraudulent appropriation of property by person to whom such property has been intrusted, or into whose hands it has lawfully come.—*Union Nat. Bank v. United States Fidelity & Guaranty Co.*, 329.

**EMPLOYERS AND EMPLOYÉS.**

See Master and Servant.

**EMPLOYERS' LIABILITY ACTS.**

See Master and Servant, §§ 3, 5.

Damages recoverable for wrongful death, see Death, § 1.

Rulings of United States Supreme Court relating to Federal Employers' Liability Act as binding on state courts, see Courts, § 1. Subject and title of act, see Statutes, § 1.

**ENTRY.**

Of judgment, see Appeal, § 1.

**ENTRY, WRIT OF.**

See Petitory Action.

**EQUAL PROTECTION OF THE LAWS.**

See Constitutional Law, § 5.

**EQUITABLE ESTOPPEL.**

See Estoppel, § 2.

**EQUITY.**

See Cancellation of Instruments; Injunction; Reformation of Instruments.

Equitable estoppel, see Estoppel, § 2.

**ESCHEAT.**

Under Civ. Code, arts. 485, 929, and in view of articles 878, 917, 940, when a vacant succession falls to the state, the maxim, "*Le mort saisit le vif*," does not apply, and state is not entitled to seisin depending on succession, and does not succeed to deceased or become eo instanti vested with ownership of property.—*Puyolet v. Gehrke*, 315; *In re Gehrke*, Id.

Under Const. 1898, art. 254, and Const. 1913, art. 254, property depending upon vacant succession falling to state remains in such succession until sold, and proceeds then become property of state, subject to claims of any creditors or heirs of deceased.—Id.

**ESTABLISHMENT.**

Of boundaries, see Boundaries, § 2.

Of drains, see Drains, § 1.

Of will, see Wills, § 2.

**ESTATES.**

Decedents' estates, see Succession.

Estates for years, see Landlord and Tenant.

Tenancy in common, see Tenancy in Common.

## ESTOPPEL

By judgment, see Judgment, § 5.  
 Effect of refusal to consider plea of in partition proceedings, see Partition, § 1.  
 Plea of in action for wrongful sequestration, see Sequestration.  
 Review on plea of, see Appeal, § 9.  
 To avoid or forfeit insurance policy, see Insurance, § 3.  
 To claim title under tax sale, see Taxation, § 7.  
 To deny legality of tax, see Taxation, § 4.  
 To invoke benefit of Employers' Liability Act, see Master and Servant, § 5.  
 To take appeal, see Appeal, § 2.

### § 1. By deed.

In petitory action, defendant, holding by title derived through plaintiff, may repudiate that title and claim by a new title derived from another who was the real owner, but he cannot impugn the title which he holds from plaintiff when his claim rests wholly upon its validity.—*Sanders v. Tremont Lumber Co.*, 181.

Where defendant sold plaintiff land to which he had no title and reserved the mineral rights, and plaintiff afterwards bought from the owner and sued defendant for claiming mineral rights, defendant's plea of estoppel, based on declarations in defendant's deed reserving mineral rights, *held* not well founded since plaintiff was not claiming under title conveyed by defendant.—*Wilson v. Pierson*, 287.

### § 2. Equitable estoppel.

Acts of drainage board created by Act No. 165 of 1858, in acquiring state land from private orphan asylum, and transferring it to city of New Orleans, were not binding by estoppel on the state board being mere local agency.—*State v. New Orleans Land Co.*, 858.

Under Civ. Code, art. 2272, providing that the act of confirmation or ratification of obligation against which law admits action of nullity or rescission is valid only when containing the substance of the obligation, mention of the motive of the action of rescission, and the intention of supplying the defect on which it is founded, an estoppel cannot be based on a legislative act which does not contain such matter.—*Id.*

In the absence of assumption of responsibility for, or misrepresentation of, the title of land conveyed, there can be no ground for estoppel in that respect.—*Id.*

## EVIDENCE.

See Affidavits; Witnesses.

Objections for purpose of review, see Appeal, § 3.

Reception at trial, see Trial, § 1.

Remand of case on appeal to allow introduction of newly discovered evidence, see Appeal, § 10.

Sheriff's deed as evidence of transfer, see Execution, § 1.

*As to particular facts or issues.*

See Boundaries, § 2; Damages, § 4.

*In actions by or against particular classes of persons.*

See Master and Servant, § 3, 5; Railroads, § 3.  
 Sureties, see Suretyship, § 2.

*In particular civil actions or proceedings.*

See Divorce and Separation from Bed and Board, § 2; Libel and Slander, § 3; Petitory Action.

For breach of contract, see Contracts, § 3.

For causing death, see Death, § 1.

For injuries or death caused by operation of railroad, see Railroads, § 3.

For injuries to servant, see Master and Servant, § 3.

On insurance policy, see Insurance, § 5.

To enjoin interference with leased oil lands, see Mines and Minerals, § 1.

On suretyship obligation, see Suretyship, § 2.  
 Proceedings under Employers' Liability Act, see Master and Servant, § 5.

*In criminal prosecutions.*

See Criminal Law, § 10; Homicide, § 5.

Review of rulings, see Criminal Law, § 14.

### § 1. Presumptions.

There is a presumption that a letter, properly addressed, stamped, and mailed, reached destination in due time.—*Pure Oil Operating Co. v. Gulf Refining Co. of Louisiana*, 284.

The presumption that every one knows the law means, particularly if not merely, that every one is presumed to know what laws have been promulgated, and not that every one is in bad faith who does not know how a court of last resort is going to construe the law.—*Delouche v. Rosenthal*, 581.

Where a purchaser alleged and defendant admitted a contract of sale, a court of equity would rather assume that the contract was in the form required for a legal contract, as legality rather than illegality is presumed in such cases.—*Cousin v. Schmidt*, 843; *In re Schmidt*, *Id.*

Testimony of physician and surgeon, opposing allowance of accounts of his patient as executor and sole heir of her deceased mother, that he was employed by patient's mother, and not by the patient or her husband, and considered the mother liable, was strongly corroborated by fact that patient did not deny such testimony.—*Succession of Levitan*, 1025.

### § 2. Parol or extrinsic evidence affecting writings.

If the boundaries of land are not sufficiently defined in the act whereby it is sold, they may be established by evidence aliunde the act, in-



cluding evidence as to the construction which the parties to the act have placed on it.—Croom v. Noel, 189.

While oral testimony may be inadmissible to show that bequest of annuity means anything other than language fairly imports, it may be admissible to enable court to determine whether annuity previously allowed same beneficiary was intended to be merely continued or doubled.—Marks v. Loewenberg, 196.

Under Civ. Code, arts. 2236, 2276, parol evidence was inadmissible to prove an independent verbal agreement to divide profits arising from a resale of real property where act of sale conveyed property to defendant for a stated consideration with no stipulation outside of ordinary warranty and subrogation clauses.—Pfeiffer v. Nienaber, 601.

Purchase of realty which appears by written evidence of sale to have been made by one person cannot be shown by parol to have been made in reality by or for another person, where offer of evidence is to affect title, but evidence is admissible to show payment of promissory note or extinguishment of money obligation by confusion.—Bernheim v. Pessou, 609.

Where mining company's sale to canal company of land for right of way was made for cash, with nothing said as to further consideration, parol evidence, in mining company's suit, as to failure of consideration through abandonment of canal enterprise, was properly rejected as proving something beyond written contract.—Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co., 743.

A written receipt for money paid on account for the "purchase price" of land, imperfectly described, may be supplemented by parol evidence identifying the land and establishing the amount agreed on as the price.—Cousin v. Schmidt, 843; In re Schmidt, Id.

## EXAMINATION.

Of witnesses in general, see Witnesses, § 1.

## EXCAVATIONS.

In sidewalks, see Municipal Corporations, § 6. Liability for acts of independent contractor, see Master and Servant, § 4.

## EXCEPTIONS.

In acts of sale, see Sales, § 11.  
To capacity to sue, see Parties, § 1.  
To citation in ejectment, see Petitory Action.  
To pleadings, see Pleading, §§ 4, 5.

## EXCEPTIONS, BILL OF.

In criminal prosecutions, see Criminal Law, § 14.  
Necessity for purpose of review, see Appeal, § 6.

## EXCESSIVE DAMAGES.

See Damages, § 3.

## EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

## EXCUSABLE HOMICIDE.

See Homicide, § 3.

## EXECUTION.

See Judicial Sales.

Exemptions, see Homestead.

### § 1. Sale.

A sheriff's deed, without the writ and judgment or order of court authorizing it, is not sufficient evidence of a transfer of title.—Rousel v. New Orleans Land Co., 1058.

## EXECUTORS AND ADMINISTRATORS.

See Succession.

## EXECUTORY PROCESS.

One whose executory process to collect a mortgage debt has been enjoined, may test, by summary proceeding, sufficiency of surety on injunction bond during vacation of district court for parish of Orleans, as being an interlocutory order within Act No. 4 of 1896.—Citizens' Homestead Ass'n v. Dugue, 344.

Judgment on appeal from order of executory process, disposed of on face of proceedings, is not res judicata in a suit to annul mortgage and executory process proceedings depending upon evidence dehors the proceedings considered on such appeal, and relating partly to matters occurring subsequent to that appeal.—St. John Lumber Co. v. Federal Nat. Bank, 693.

The only questions triable on an appeal from an order of executory process are those involving the regularity of the proceedings on their face.—Id.

## EXEMPTIONS.

See Homestead.

From taxation, see Taxation, § 2.

## EXHIBITS.

Annexed to pleading, see Pleading, § 6.

**EX PARTE ORDER.**

As basis of prescription, see Prescription, § 4.

**EX POST FACTO LAWS.**

Constitutional restrictions, see Constitutional Law, § 4.

**EXPROPRIATION.**

Public improvements by municipalities, see Municipal Corporations, § 3.

**FACTORS.**

See Brokers.

**FARMERS.**

Retailing products of farm as hawking or peddling, see Hawkers and Peddlers.

**FEDERAL EMPLOYERS' LIABILITY ACT.**

Damages recoverable for wrongful death, see Death, § 1.

Rulings of United States Supreme Court relating thereto as binding on state courts, see Courts, § 1.

**FELLOW SERVANTS.**

See Master and Servant, § 3.

**FIDELITY INSURANCE.**

See Insurance, § 1.

**FIERI FACIAS.**

See Execution.

**FILING.**

Record on appeal, see Appeal, § 6.

**FINAL JUDGMENT.**

Appealability, see Appeal, § 1.

**FIRE INSURANCE.**

See Insurance.

**FORCED HEIRS.**

See Succession, § 2.

Power of testator to postpone right to possession of legitime, see Wills, § 3.

**FORECLOSURE.**

Of mortgage, see Mortgages, § 2.

**FOREIGN JUDGMENTS.**

See Judgment, § 6.

**FORFEITURES.**

Of insurance, see Insurance, § 2.  
Of sheriff's office, see Sheriffs and Constables, § 1.

**FORGERY.**

Reception of evidence on question of forgery of instruments sued on, see Trial, § 1.  
Sale of forged paper, see Bills and Notes, § 1.

**FORMER ADJUDICATION.**

See Judgment, § 5.

**FORMER JEOPARDY.**

Bar to prosecution, see Criminal Law, § 9.

**FORMS OF ACTION.**

See Petitory Action; Trover and Conversion.

**FRATERNAL ORDERS.**

Exemption from taxation, see Taxation, § 2.

**FRAUD.**

See Fraudulent Conveyances.

Affecting validity of election, see Elections, § 2.

Affecting validity of judicial sales, see Judicial Sales.

Inducing contract of sale, see Sales, §§ 4, 8.

In procuring insurance, see Insurance, § 1.

**FRAUDS, STATUTE OF.**

§ 1. Real property and estates and interests therein.

Where mining company's sale to canal company of land for right of way was made for cash, with nothing said as to further consideration, parol evidence, in mining company's suit, as to failure of consideration through abandonment of canal enterprise, was properly rejected as affecting title to realty.—Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co., 743.

## FRAUDULENT CONVEYANCES.

Compelling election under pleading in revocatory action, see Pleading, § 7.  
Inconsistency in pleading in revocatory action, see Pleading, § 1.

### § 1. Remedies of creditors and purchasers.

The revocatory action lies when the sale complained of was made by judicial process, or by convention of the parties.—*Swain v. Kirkpatrick Lumber Co.*, 30.

Under Civ. Code, arts. 1971, 1987, 1993, a debtor's alleged frauds committed prior to the indebtedness upon which the creditor declares gave the creditor no right of action.—*Hibernia Bank & Trust Co. v. Louisiana Ave. Realty Co.*, 962; *Interstate Trust & Banking Co. v. Same*, 971.

Under Civ. Code, arts. 1971, 1987, 1993, a creditor's suit based on his debtor's frauds not begun until more than a year after such alleged frauds is prescribed.—*Id.*

A creditor who believes that his debtor disposed of his property with fraudulent intent, but is without means of knowing whether the debtor has done so for a real consideration with a purchaser's connivance, or has merely executed a paper title as a sham, may attack such transaction in a single action by pleading his cause in the alternative.—*Id.*

A "simulated contract" is one which, though clothed in concrete form, has no existence in fact, and it may at any time, and at the demand of any person in interest, be declared a sham, and may be ignored by creditors of the apparent vendor.—*Id.*

## FUGITIVES FROM JUSTICE.

Prescription of action against, see Prescription, § 3.

## FULL FAITH AND CREDIT.

See Judgment, § 6.

## GAS.

Natural gas lands, see Mines and Minerals, § 1.

Owner of pipe line, conveying so dangerous fluid as natural gas through what appears to be, and is used as, public highway, must exercise care commensurate with danger to protect public in person and property from injury.—*Jackson v. Texas Co.*, 21.

Where escape of natural gas from pipe lines could be heard and, when lighted, seen, owner, not learning of leak until injury to child, and whose perfunctory inspection was not likely to have informed it of leak, was negligent in not discovering leak, and liable for injury.—*Id.*

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Doctrine that occupier of land need not make it safe for children coming on it without invitation does not apply where occupier takes no steps to inform public of natural gas pipe line under land appearing to be a highway, where escape of gas results in injury to child.—*Id.*

Where company negligently allowed leak in its natural gas pipe line on land used as highway by small children, who were attracted by escaping gas, though not capable of appreciating probable consequences, and one lit it at request of another who was burned, company's negligence was proximate cause of injury.—*Id.*

## GOOD FAITH.

Of purchaser of bill or note, see Bills and Notes, § 1.

Of purchaser of land, see Sales, § 8.

## GRAND JURY.

See Indictment and Information.

Harmless error in failure to impanel grand jury, see Criminal Law, § 14.

Where the grand jury on investigating a charge of murder by a policeman returned "not a true bill," its return was prima facie evidence that the policeman did not commit a crime.—*Jones v. City of New Orleans*, 1073.

## GRANTS.

Of public lands, see Public Lands.

## GUARANTY.

See Suretyship.

## HARMLESS ERROR.

In criminal prosecutions, see Criminal Law, § 14.

## HAWKERS AND PEDDLERS.

A peddler or hawker is an itinerant merchant or trader, who goes from house to house or from place to place, exposing and selling the goods, wares, or merchandise he carries.—*State ex rel. Brittain v. Hayes*, 39.

Occupation of dairyman delivering milk from his farm to regular customers to fill previous orders is not within ordinary meaning of term "peddling or hawking."—*Id.*

Under Act No. 229 of 1912, peddlers or hawkers of farm products who are required to pay license tax are, not those whose industry has produced such products, but those who buy, sell or trade in them.—*Id.*

Farmer retailing products of his farm is pursuing occupation as farmer, and is not subject to license tax imposed on "hawkers and peddlers," but is within Const. art. 229, exempting person engaged in agricultural pursuits from any license tax.—Id.

## HEARING.

On appeal, see Appeal, § 8.

## HEIRS.

See Succession.

## HIGHWAYS.

See Municipal Corporations, § 6.

Accidents at railroad crossings, see Railroads, § 3.

In connection with canals, see Canals, § 1. Streets in cities, see Municipal Corporations, § 5.

### § 1. Taxes, assessments, and work on highways.

Ordinance requiring payment of street tax or work on streets is not invalid, because reversing order of alternative requirements, as suggested by Act No. 17 of 1910, authorizing municipalities to compel citizens to work on streets or pay tax.—Village of Cedar Grove v. Bartness, 295.

Const. art. 281, relating to parochial corporations, and fixing a 10-mill rate of taxation for road and bridge purposes, as amended pursuant to Act No. 197 of 1910, was superseded by 5-mill rate re-established by art. 291, as amended pursuant to Act No. 236 of 1912, so that police jury duly authorized by vote may impose parish tax of 5 mills for five years for road purposes, but may not impose another such tax for same purpose on property in particular wards called a road district.—Hayne v. Assessor, 697; Natalie Oil Co. v. Same, Id.

## HOMESTEAD.

### § 1. Rights of surviving husband, wife, children, or heirs.

To entitle a surviving spouse under Const. art. 244, subd. 4, to the benefit of a homestead exemption, such spouse must have a father or mother or a person or persons dependent upon him or her for support.—W. T. Baker & Co. v. Davis, 215.

## HOMICIDE.

Argument and conduct of counsel, see Criminal Law, § 12.

Continuance of prosecution, see Criminal Law, § 11.

Failure of grand jury to return bill as evidence of innocence, see Grand Jury.

Sufficiency of bill of exceptions, see Criminal Law, § 14.

### § 1. Murder.

Murder, as defined at common law, is where a person of sound mind and discretion unlawfully kills any human being in the peace of the sovereign with malice aforethought, either express or implied.—State v. Robinson, 543.

Crime of murder under Louisiana law is the same as at common law.—Id.

In Louisiana there are no degrees of murder, but, as at common law, only plain murder.—Id.

### § 2. Manslaughter.

No such crime as involuntary manslaughter is known to Louisiana law, though at common law there was such a crime, punishable differently from voluntary manslaughter.—State v. Robinson, 543.

### § 3. Excusable or justifiable homicide.

To justify killing as in self-defense, overt act of deceased person need not have amounted to felonious assault.—State v. Robinson, 543.

### § 4. Indictment and information.

Despite Rev. St. § 784, providing death penalty for willful murder, indictment for murder need not use the word "willful" or "willfully."—State v. Robinson, 543.

"Aforethought" qualifying "malice" is so technical a word that it cannot be left out of an indictment for murder.—Id.

In an indictment for murder committed on a certain day, time is not of the essence of the crime charged, and state is not restricted in its evidence to such day, but may show its commission at any time before indictment and within period of prescription.—State v. Barnhart, 596.

In a trial for murder, the state's evidence, showing that the offense was committed several months earlier than the date charged, was admissible, as it is not necessary to give a specific date, and as time is not of the essence of the offense.—Id.

### § 5. Evidence.

Where there was no proof that the one whom defendant killed had provoked the difficulty, a conversation between defendant and deceased's father offered to show that killing was without malice aforethought, but in heat of passion, held properly excluded.—State v. Harper, 534.

Where the evidence showed that defendant was the aggressor, evidence of the dangerous character of the deceased was inadmissible.—Id.

In a prosecution for murder, evidence held not to show that deceased believed that he

had no hope of recovery and was about to die when he accused defendants of having shot and cut him.—*State v. Cutrera*, 738.

The accusing declaration made by one not under oath or subject to cross-examination is inadmissible against the accused as a dying declaration, unless there is evidence showing to the satisfaction of the legal mind that accuser when making it had no hope of recovery.—*Id.*

Where evidence did not show that deceased when he made declaration accusing defendants was without hope of recovery, the testimony of deputy sheriff as to what deceased said shortly after his injury was inadmissible as a dying declaration.—*Id.*

#### § 6. Trial.

Since it is not essential that an indictment for murder contain the word "willful" or "willfully," the charge defining the offense need not contain the word.—*State v. Robinson*, 543.

If Rev. St. § 1048, prescribing short form of indictment for murder, prohibits use of common-law form of indictment, and makes imperative use of short form, only indictment is regulated, and not court's charge describing offense, which need not contain word "willfully," as short form of indictment must.—*Id.*

Judge trying prosecution for murder is not required by any law to include definition of murder in his charge.—*Id.*

In prosecution for murder, trial judge in charging is not compelled by any statute or rule at common law to use any particular words or set of words in fulfilling his duty of giving the jury a knowledge of the law of murder.—*Id.*

Despite Rev. St. § 784, providing that whoever shall commit crime of willful murder, on conviction thereof, shall suffer death, charge defining offense need not use word "willful" or "willfully."—*Id.*

In prosecution for murder, court improperly charged that "aforethought," used in connection with "malice" in definition of murder, adds little, if any, to meaning of "malice" standing alone.—*Id.*

In prosecution for murder, instruction held erroneous in view of evidence, as calculated to create impression accused must have been violently assaulted in order to be in position to plead self-defense.—*Id.*

In prosecution for murder, judge is not required to charge as to involuntary manslaughter, a crime unknown to Louisiana law.—*Id.*

In prosecution for murder, instruction that where only one party enters fight armed with dangerous weapon and uses it against unarmed antagonist and kills him, slayer is not to be heard to say killing was manslaughter as done in passion, held erroneous as abstract, etc., in view of evidence.—*Id.*

## HUMANITARIAN DOCTRINE.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 2; Railroads, § 3; Street Railroads, § 1.

## HUSBAND AND WIFE.

See Divorce and Separation from Bed and Board.

Homestead rights, see Homestead.

### § 1. Conveyances, contracts, and other transactions between husband and wife.

Except as modified by Act No. 94 of 1916, law of Louisiana prohibits all contracts between husband and wife, including those entered into while they are temporarily in another jurisdiction.—*Marks v. Loewenberg*, 196.

Except as modified by Act No. 94 of 1916, law of Louisiana prohibits wife's conveyance of her paraphernal property to husband in trust for third person for life.—*Id.*

### § 2. Disabilities and privileges of coverture.

It has not been the policy of the law of Louisiana to permit married women to impoverish themselves through conjugal influence or inexperience, nor to permit them to enrich themselves at the expense of others.—*Verneulle v. Stann*, 681.

Where married woman not authorized by husband or by the judge received a loan in form of payments for a lot title to which was put in her name and approved a suit on her notes, the judgment authorized a sale under execution, conclusive against her, her heirs, and former owners as to validity of purchaser's title.—*Id.*

If, prior to effect of Act No. 94 of 1916, there was no express enactment requiring married women to return money or property acquired under contracts void by reason of their incapacity, the case was one for application of so much of Civ. Code, art. 21, as requires judge to decide according to equity.—*Id.*

### § 3. Wife's separate estate.

The capacity of a married woman, domiciled in Louisiana, to bind herself, or her property, by contract is determined by the law of her domicile.—*National City Bank of Chicago v. Barringer*, 14; *In re National City Bank of Chicago*, 14.

One lending money to a married woman on authorization of her husband without that of judge of her Louisiana domicile, as provided by Civ. Code, arts. 126-128, can recover it only upon affirmative proof that it inured to her separate benefit, and was not borrowed for her husband or to pay his debts, or for the community.—*Id.*

**§ 4. Actions.**

In view of R. S. § 3629, and Code Prac. arts. 182, 192, a citation and notice of seizure in a suit against husband and wife served on husband alone was not a good service, where she was sued for his debt, and made no appearance and received no notice of judgment.—*White-side v. Lafayette Fire Ins. Co.*, 675.

**§ 5. Community property.**

Husband, survivor in community, can stand in judgment alone in suit via executiva or via ordinaria for foreclosure of mortgage upon community property securing debt due from him as head of community.—*Beck v. Natalie Oil Co.*, 153.

In suit by divorced wife for settlement of community acquêts and gains, evidence held to show that house and lot was bought by husband with money loaned him by his mother for that purpose, and that sale to her later was dation en paiement in reimbursement of loan.—*Siverd v. Dumestre*, 578.

Where husband invested in house and lot his savings before marriage, community, on dissolution by divorce, owed him purchase price of house and lot.—*Id.*

In suit by divorced wife for settlement of community of acquêts and gains, as to five certificates of stock in home association, evidence held to show they were bought in wife's name with money which husband had given her as gifts.—*Id.*

Money expended by husband in repairs on house which constituted community property was community expense to be allowed him on dissolution of community by divorce.—*Id.*

By Rev. Civ. Code, art. 2402, money earned by a wife before institution of her separation suit belonged to the community, and its payment for account of the community after her institution of suit was simply payment of a community debt with community funds.—*Gastauer v. Gastauer*, 749.

Judgment for a wife in her suit for separation from bed and board, under Rev. Civ. Code, art. 2432, retroacted to date of filing of suit, so that the costs of suit taxed against husband are not chargeable to community, but to him separately.—*Id.*

Third person's judgment against husband for debt accruing after wife's institution of separation suit was a separate debt of the husband, not chargeable to the community; judgment in separation suit retroacting to date of filing under Rev. Civ. Code, art. 2432.—*Id.*

With whatever motive a husband discontinued his divorce suit, the suit was discontinued, and the disability of the husband, under Rev. Civ. Code, art. 150, to dispose of the immovables of the community incident to the pendency of such suit no longer existed.—*Id.*

The husband as head and master of the community has the privilege of selling its property in good faith without the permission or approval of the wife.—*Simon v. Meaux*, 760

**IMMOVABLES.**

See Judicial Sales; Prescription, § 4.

**IMPAIRING OBLIGATION OF CONTRACT.**

See Constitutional Law, § 3.

**IMPEACHMENT.**

Of record, see Appeal, § 6.

**IMPRISONMENT.**

See Bail.

**IMPROVEMENTS.**

On property involved in petitory action, see Petitory Action.  
Privileges, see Mechanics' Privileges.  
Public improvements, see Municipal Corporations, § 3.

**INADEQUATE DAMAGES.**

See Damages, § 3.

**INCUMBRANCES.**

On property of intestate, see Succession, § 2.

**INDEMNITY.**

See Suretyship.

**INDEPENDENT CONTRACTORS.**

See Master and Servant, § 4.

**INDICTMENT AND INFORMATION.**

See Grand Jury.

For homicide, see Homicide, § 4.

For keeping disorderly house, see Disorderly House.

Service of information on accused, see Criminal Law, § 12.

**§ 1. Requisites and sufficiency of accusation.**

An indictment should not be held invalid or insufficient for stating incorrectly the date

of the alleged crime, if the date or time be not of the essence of the offense.—*State v. Williams*, 424.

Where information for keeping blind tiger, as defined by Act No. 8 (Ex. Sess.) of 1916, § 1, sets out keeping of place in prohibition territory where liquor was kept for sale, exchange, or habitual gift, defendant was not entitled to bill of particulars showing intent not to charge a keeping, etc., in connection with a business, or specifying brands of liquors.—*State v. Maggione*, 463.

Though common-law form of indictment for murder is good under Louisiana law, if short form of indictment, provided by Rev. St. § 1048, is used, it must be strictly adhered to, and word "willfully" employed.—*State v. Robinson*, 543.

## § 2. Amendment.

Under Rev. St. § 1047, trial judge, on motion of district attorney, may order change in names of victim and one accused of murder, if he finds the change was not prejudicial to defendant, provided change is not made as to identity of such parties.—*State v. Grimms*, 421.

Authority to amend an indictment, where permissible, is not confined to the grand jury, and the trial judge may order an indictment amended during the trial in the particulars mentioned in Rev. St. § 1063, on motion of district attorney.—*State v. Williams*, 424.

## INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 1.

## INFANTS.

See Minors.

## INFORMATION.

Criminal accusation, see Indictment and Information.

## INHERITANCE.

See Succession.

## INJUNCTION.

Against collection of taxes, see Taxation, § 6.  
Against infringement of corporate name, see Corporations, § 1.

Against interference with leased oil lands, see Mines and Minerals, § 1.

Against mortgage foreclosure, see Mortgages, § 2.

Against tax sale, see Taxation, § 6.

Finality of judgment for purpose of review, see Appeal, § 1.

Jurisdiction as between different divisions of courts, see Courts, § 1.

Restraining nuisance, see Nuisance, § 1.

Subject and title of statute, see Statutes, § 1.

## § 1. Subjects of protection and relief.

Before a criminal or a civil court has jurisdiction of a case involving both an offense and a property right, possessor of property right, invaded by enforcement of penal ordinance, may obtain protection by appeal to tribunal having jurisdiction, which pending disposition may prohibit adverse litigant from taking it to criminal court.—*Osborn v. City of Shreveport*, 932.

## § 2. Actions for injunctions.

Agreement not amounting to sale of house on residence street conveyed no such right to alleged purchaser as would entitle him to enjoin municipal authorities' prosecution of him for carrying on an undertaking business on such street in violation of ordinance.—*Osborn v. City of Shreveport*, 932.

## § 3. Preliminary and interlocutory injunctions.

Though preliminary injunction may issue to maintain plaintiff in possession, it should not be allowed to oust one in possession of property.—*Pure Oil Operating Co. v. Gulf Refining Co. of Louisiana*, 284.

Surety on an injunction bond is insufficient, where the property he owns is so much involved as to make it hard to be reached and uncertain as to what it might bring at a forced sale.—*Citizens' Homestead Ass'n v. Dugue*, 344.

One whose executory process to collect a mortgage debt has been enjoined, may test, by summary proceeding, sufficiency of surety on injunction bond during vacation of district court for parish of Orleans, as being an interlocutory order within Act No. 4 of 1896.—*Id.*

Where insufficiency of injunction bond is not shown to have been result of error or omission, Act No. 112 of 1916, allowing litigant to furnish new bond when one furnished is insufficient in amount or incorrect by reason of error or omission, has no application.—*Tremont Lumber Co. v. May*, 389; *Louisiana Central Lumber Co. v. Same*, 420; *Davis Bros. Lumber Co. v. Same*, *Id.*

Though, by Act No. 112 of 1916, taxpayer who has enjoined collection of tax is allowed two days to furnish new bond prior to judgment, after notice of complaint by collector of insufficiency of bond furnished, and though he may receive notice only on day when motion to dissolve injunction is filed and tried, if he fails to tender new bond or claim delay, and does not thereafter make tender, he loses privilege.—*Id.*

Where bond is insufficient in amount, injunction must be dissolved.—*Id.*

Doctrine or rule that court will not dissolve injunction if it is apparent that the party is immediately entitled to another, has no application in cases in which it appears the party would not immediately or perhaps not at all be entitled.—Id.

### IN PAIS.

Estoppel, see Estoppel, § 2.

### IN PERSONAM.

Mortgage foreclosure, see Mortgages, § 2.

### IN REM.

Mortgage foreclosure, see Mortgages, § 2.  
Proceedings for establishment of drainage district, see Drains, § 1.  
Venue of proceedings, see Venue, § 1.

### INSOLVENCY.

Of national banks, see Banks and Banking, § 2.

### INSPECTION.

Of pipe line, see Gas.

### INSTRUCTIONS.

Consideration on appeal, of instructions to jury, see Appeal, § 10.  
In prosecution for homicide, see Homicide, § 6.

### INSURANCE.

#### § 1. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Where parties to a contract of fidelity insurance make certain facts the basis of the contract, agreeing that certain answers shall be warranties, the court will not assume to correct the understanding of the parties as to the materiality of such facts.—Bank of Cotton Valley v. McInnis, 436.

Where the parties to such contract have stipulated that a fact is material, the false representation of the existence or nonexistence of any such fact will avoid the contract.—Id.

#### § 2. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

A policy of insurance by its terms avoided by a change of possession will not be annulled by an illegal and fictitious seizure, where there was neither an actual nor a valid seizure of the property insured.—Whiteside v. Lafayette Fire Ins. Co., 675.

Where life insurer, before canceling policy for nonpayment of a premium, gave insured due notice of date when premium would fall due, of due date of note, of intention to cancel unless it was paid, and of willingness to reinstate policy if premium and note were paid, or premium and interest on note, insurer having died after cancellation, full amount of policy is not due.—Darby v. Equitable Life Assur. Soc. of the United States, 757.

By Acts No. 193 of 1906, life insurance policies are nonforfeitable after they have been in force three years, having then a cash or surrender value.—Id.

In absence of expert showing to contrary, court will assume that calculation of surrender value after three years, as made and agreed to in a life policy, is correct.—Id.

#### § 3. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Stipulation in fire insurance policy that no waiver of policy provision shall be effective unless written on or attached to policy is a legal and binding contract.—Martin v. First Nat. Fire Ins. Co., 631.

Where fire insurance policy stipulates that no waiver of policy provisions shall be effective unless written on or attached to a policy, insured cannot claim waiver or estoppel based on knowledge of insurer's agent that policy is being violated.—Id.

#### § 4. Payment or discharge, contribution, and subrogation.

Under Act. No. 168 of 1908, p. 226, statutory damages and attorneys' fees may be imposed upon an insurer withholding money on the indefensible ground of avoidance by a change of possession.—Whiteside v. Lafayette Fire Ins. Co., 675.

#### § 5. Actions on policies.

In an action on a binder of insurance on paintings alleged to have been destroyed by fire, evidence held to show that plaintiff did not possess the works of some of the painters whose names appeared upon his list of titles and painters submitted to insurer's agent.—Allison v. Firemen's Ins. Co. of Newark, N. J., 851.

### INTEREST.

On license tax against street railroad, see Street Railroads, § 1.

### INTERIOR DEPARTMENT.

See Public Lands, § 1.

### INTERLOCUTORY INJUNCTION.

See Injunction, § 3.



## INTERLOCUTORY JUDGMENTS OR ORDERS.

Appealability, see Appeal, § 1.  
Determination on appeal from, see Appeal, § 10.

## INTERPRETATION.

Of acts of sale, see Sales, § 11.  
Of constitution, see Constitutional Law, § 1.  
Of contracts in general, see Contracts, § 2.  
Of contracts for sale of immovables, see Sales, § 5.  
Of pleading, see Pleading, § 1.  
Of statutes, see Statutes, § 3.  
Of wills, see Wills, § 3.

## INTERVENTION.

Appellate jurisdiction of supreme court dependent on amount claimed by plaintiff and intervenor, see Courts, § 2.

## INTESTACY.

See Succession.

## INTOXICATING LIQUORS.

Bill of particulars in prosecution for violation of liquor laws, see Indictment and Information, § 1.  
Venue of prosecution for violation of liquor laws, see Criminal Law, § 8.

### § 1. Offenses.

Under Act No. 23 of 1915 (Ex. Sess.), denouncing certain offenses, "to deliver for shipment" and "to ship" mean the same thing.—State v. Lieber, 158; In re State ex rel. Ellis, Id.

The elements of keeping a blind tiger, as defined by Act No. 8 (Ex. Sess.) of 1915, § 1, are the keeping of a place in prohibition territory where liquor is kept for sale, exchange, or habitual gift, or for such purposes in connection with any business conducted at such place.—State v. Maggione, 463.

One isolated sale of intoxicating liquor constitutes a violation of Rev. St. § 910, penalizing the offense of retailing intoxicating liquors without previously obtaining a license.—State v. Minion, 529.

Act No. 23 of 1915 (Ex. Sess.) was not intended to make it unlawful for a citizen of another state to buy intoxicating liquor in Louisiana of one legally authorized to sell it and to carry it into such other state to be used by himself and family or otherwise disposed of.—State v. Block, 766; In re Block, Id.; State v. Lark, 771; In re Lark, Id.

## ISSUES.

Presented for review on appeal, see Appeal, § 3.

## JACTITATION.

See Libel and Slander, § 4.

## JEOPARDY.

Former jeopardy as bar to prosecution, see Criminal Law, § 9.

## JOINT TENANCY.

See Tenancy in Common.

## JUDGES.

See Courts; Justices of the Peace.

## JUDGMENT.

Against partnership, see Partnership, § 1.  
Decisions of courts in general, see Courts, § 1.  
In mortgage foreclosure proceedings, see Mortgages, § 2.  
On appeal, see Appeal, § 10.  
Review, see Appeal.  
Sales under judgment, see Judicial Sales.

### § 1. Nature and essentials in general.

A judgment in excess of jurisdiction is not necessarily void in toto.—Local Union No. 76 of United Brotherhood of Carpenters and Joiners of America v. United Brotherhood of Carpenters and Joiners of America, 901.

### § 2. By confession.

A judgment by confession is not set aside for errors of fact not attributable to the prevailing party's fault.—Succession of Ruffin, 828.

### § 3. On consent, offer, or admission.

A judgment obtained at one's own instance and in one's own favor, as well as in favor of one to whose prejudice it is sought to be annulled, is not to be set aside for errors of fact not attributable to the prevailing party.—Succession of Ruffin, 828.

### § 4. Collateral attack.

A judgment annulling a sale to the state for delinquent taxes rendered by court without jurisdiction *ratione materie*, in a suit wherein state is not a party and where all of taxes have not been paid, is void.—Ebert v. Woodville, 874.

### § 5. Res judicata.

Where L. obtained personal judgment against H., his co-owner, for reimbursement of H.'s share of L.'s expenditures for insurance and taxes, and judgment is pleaded by H. as res

judicata in subsequent suit in which L. disputes title of H., L. cannot question validity of judgment on ground that he was only entitled to reimbursement for taxes and not for insurance.—*Firemen's Ins. Co. v. Hava*, 254; *Hava v. Livaudais*, Id.

An incidental or collateral question on which depends the principal question at issue between the parties to a suit, although not disputed by either of them, is foreclosed by a judgment on the main issue.—Id.

Plea of res adjudicata will be sustained on showing that claim demanded by suit is same as that demanded in former suit, embracing the same cause of action between same parties in the same qualities, where former suit has been decided by final and nonappealable judgment.—*American Trust Co. v. Crescent Ice Co.*, 568.

Judgment on appeal from order of executory process, disposed of on face of proceedings, is not res judicata in a suit to annul mortgage and executory process proceedings depending upon evidence dehors the proceedings considered on such appeal, and relating partly to matters occurring subsequent to that appeal.—*St. John Lumber Co. v. Federal Nat. Bank*, 693.

#### § 6. Foreign judgments.

Where judgment or order of federal court did not authorize sale of property belonging to certain heirs, or to any one except city of New Orleans, receiver's attempted sale of property of such heirs was not authorized, and hence was not protected by the full faith and credit clause of federal Constitution.—*Roussel v. New Orleans Land Co.*, 1058.

Where judgment or order of federal court was not rendered against certain heirs, but merely authorized a sale of property belonging to city of New Orleans, there was no need for an action for the nullity of the judgment on part of those claiming under such heirs before insisting on title under such heirs.—Id.

### JUDICIAL MORTGAGE.

On property judicially sold, see Judicial Sales.

### JUDICIAL NOTICE.

Of absence of order for appeal, see Appeal, § 7.

### JUDICIAL SALES.

On execution, see Execution, § 1.

Fraud in concealment of facts is not the only cause vitiating a judicial sale, but any action by party in interest preventing competition, if proven, will cause sale to be set aside.—*Swain v. Kirkpatrick Lumber Co.*, 30.

By express provision of Civ. Code, art. 1343, any coheir who is of age can become purchaser at sale of hereditary effects to amount owing him from succession without paying surplus over portion coming to him until it has been definitely fixed by partition.—*Nichols v. Bryan*, 291; *Opposition of Britton & Koontz Bank*, Id.

By direct provision of Code Prac. art. 710, if on property judicially sold a general mortgage exists, resulting either from legal or judicial mortgage, purchaser cannot avail himself of mortgage to retain part of price.—Id.

When a judicial sale is for cash, and adjudicatee refuses to comply with his bid, there is no sale, except where refusal is well grounded.—Id.

### JURAT.

See Affidavits.

### JURISDICTION.

Appellate jurisdiction, see Criminal Law, § 14. Of particular courts, see Courts.

Of proceedings to determine rates of carriers, see Carriers, § 1.

Of suit for alimony, see Divorce and Separation from Bed and Board, § 3.

Of suit for divorce or separation, see Divorce and Separation from Bed and Board, § 2.

### JURY.

See Grand Jury.

Irregularities in drawing jury as ground for new trial, see Criminal Law, § 13.

Service of list of jurors on accused, see Criminal Law, § 12.

#### § 1. Summoning, attendance, discharge, and compensation.

Where five names were successively drawn from venire box, and five jurors successively called, but they failed to appear, and judge recessed over to afternoon, names which had been taken out of box had to be restored.—*State v. Harrison*, 387.

Neither Constitution nor statutes require that 300 names shall be placed at one time in general venire box after it is once so filled; the requirement being only that names shall be supplemented to keep 300 names there from one session of court to another.—*State v. Joseph*, 428.

### JUSTICES OF THE PEACE.

Release of surety on appearance bond, see Bail, § 1.

#### § 1. Review of proceedings.

Under Civ. Code, art. 3519, as amended by Act No. 107 of 1898, providing that, if plain-

tiff allows five years to elapse without prosecuting suit, it shall be considered abandoned, and in view of Code Prac. art. 100, defendant, appealing from justice's court, does not become plaintiff in district court, and his appeal will not be dismissed for lapse of five years, without prosecution.—*Reagan v. Louisiana Western R. Co.*, 754; *In re Reagan*, Id.

## JUSTIFICATION.

Of actionable words, see Libel and Slander, § 2.  
Of homicide, see Homicide, § 3.

## JUVENILE COURTS.

Relator should have exhausted his remedies for relief in trial court before obtaining writs of certiorari or prohibition against judge of juvenile court ordering him to give a guaranty bond to pay monthly sum for support of relator's child and in default of bond to be held for further orders of the court, etc.—*State v. Clark*, 481.

Where a parent was convicted of failing to support his minor child, and ordered to pay a certain amount per month for its support, the juvenile court's order that a guaranty bond be furnished by defendant did not exceed its authority.—Id.

A writ of certiorari or of prohibition will not issue to judge of juvenile court, where defendant was ordered to pay alimony to his child, to furnish a guaranty, or conditional bond, and in default in furnishing such bond to be held for further orders of the court.—Id.

In view of Const. art. 118, §§ 2, 3, a person over 17 years of age must be charged and tried in the district court, although at the time of the commission of the criminal offense he may have been under 17 years of age.—*State v. Ebarbo*, 591.

## KNOWLEDGE OF LAW.

Presumption of, see Evidence, § 1.

## LABOR UNIONS.

See Trade Unions.

## LANDLORD AND TENANT.

Evidence of damages for driving away tenant, see Damages, § 4.

Mining lease, see Mines and Minerals, § 1.

### § 1. Terms for years.

Sale of plantation which divested vendor of ownership and power to lease, though made

while plantation was under attachment, was a sale contemplated by clause of lease according to which it was not to be renewed in event of sale.—*Herndon v. Wakefield-Moore Realty Co.*, 724; *Wakefield-Moore Realty Co. v. Herndon*, Id.

### § 2. Premises, and enjoyment and use thereof.

A landlord is not liable in damages for personal injuries suffered by the tenant in consequence of a dangerous condition of the leased premises, of which the tenant had knowledge and assumed the risk.—*McLaughlin v. Stallings*, 62.

Damages will be awarded to owner of plantation for act of violence which results in driving tenant planting on shares from his plantation.—*Sandlin v. Coyle*, 121.

In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, plea of estoppel, based on owner's effort to dissuade defendants and his inviting them into his house, not showing consent to their unlawful purpose, was without merit.—Id.

Lessor was not responsible for injury to tenant's employé from falling off stepladder nailed to end of platform, where ladder was no part of leased premises, and was not thereon when leased, or thereafter placed there by lessor's officers or employés, or known to its officers.—*Fischer v. Wells Fargo & Co. Express*, 1081.

### § 3. Rent and advances.

Where company had right to renew lease by making deposit in bank, and it made deposit, which lessors refused to accept, first as insufficient, second as too late, lessors were under no obligation to do more than inform bank of their unwillingness to accept.—*Pure Oil Operating Co. v. Gulf Refining Co. of Louisiana*, 284.

## LAND OFFICE.

See Public Lands, § 1.

## LANDS.

See Public Lands.

## LARCENY.

See Embezzlement.

Service on accused of copy of information and list of jurors, see Criminal Law, § 12.

## LAST CLEAR CHANCE.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 2; Railroads, § 3; Street Railroads, § 1.

**LAW.**

Presumption as to knowledge of, see Evidence, § 1.

**LAW OF THE CASE.**

Decision on appeal, see Appeal, § 9.

**LEADING QUESTIONS.**

See Witnesses, § 1.

**LEASE.**

See Landlord and Tenant.

Of property held in connection with canal, see Canals, § 1; determination of constitutionality of law relating to, see Constitutional Law, § 1.

Oil or gas leases, see Mines and Minerals, § 1.

**LEGACIES.**

See Wills.

**LEGITIMACY.**

Appellate jurisdiction of supreme court on questions of, see Courts, § 2.

**LEGITIMATION.**

Of issue of slaves, see Slaves.

**LEGITIME.**

Power of testator to postpone right to possession, see Wills, § 3.

**LETTERS.**

Presumption as to delivery, see Evidence, § 1.

**LEVEES.**

See Drains.

Under Const. art. 312, where part of single unit property within Orleans levee district is appropriated, owner has right of action against board of commissioners for recovery of value ascertained by deducting from value of whole before appropriation value of remainder after appropriation.—Louisiana Soc. for Prevention of Cruelty to Children v. Board of Levee Com'rs of Orleans Levee Dist., 90.

Where part of single unit improved property is appropriated for levee purposes in Orleans levee district under Const. art. 312, it would be as inconsistent with right to recover value

to hold it to be ascertained merely by dividing aggregate market value per square foot of land as unimproved and attributing quotient to part appropriated as it would be to apply process to ascertainment of value of oil painting.—Id.

As grant in Const. art. 812, is exceptional, and merely confers right of action to recover value of property appropriated for levee purposes in Orleans levee district, and differs from article 167, there can be no recovery of damages as such under grant, but causes thereof must be considered in determining value of unappropriated property to be deducted from the value of whole to fix value of that appropriated.—Id.

**LEVY.**

Of taxes, see Taxation, § 4.

**LIBEL AND SLANDER.**

§ 1. Words and acts actionable, and liability therefor.

False allegations in petitions, accusing plaintiff of certain acts of fraud as a stockholder and director of a corporation, were libelous.—Sabine Tram Co. v. Jurgens, 1092.

§ 2. Justification and mitigation.

Where plaintiff employed an expert accountant to audit the books of a corporation and had his report disclosing facts pertaining to transactions on which charges of fraud against defendant, a stockholder and director, were judicially made in its petitions, there was no probable cause for plaintiff to believe such allegations true.—Sabine Tram Co. v. Jurgens, 1092.

No one has a right or privilege to deem appropriate or pertinent to an issue presented for decision in a judicial proceeding a libelous allegation that he knows is false, or that he has no just or probable cause to believe is true.—Id.

§ 3. Actions.

In an action for slander based on words slanderous per se, *held*, on the evidence as to defendant's utterance of such words, that the plaintiff's demand was properly rejected and the suit dismissed.—Basile v. Ventura, 639.

A judgment for \$1,000, in an action for a libel contained in judicial allegations, in view of plaintiff's extended business dealings and his high commercial and social position, and in view of Civ. Code, art. 1934, giving much discretion in assessment of damages to trial judge, was not an abuse of discretion.—Sabine Tram Co. v. Jurgens, 1092.

§ 4. Slander of property or title.

In an action for slander of title, defendant, who does not deny plaintiff's possession or

right of action, must either admit or deny the alleged slander, or his dispute of plaintiff's title; and, if he claims a real right in property, he puts in issue validity of his claim.—*Wilson v. Pierson*, 287.

A denial in the answer, in an action for slander of title, that plaintiff is in possession as owner of the property is not a denial that he is in possession.—*Id.*

## LICENSES.

Appellate jurisdiction of supreme court in action involving legality of, see Courts, § 2.  
Of banks, see Banks and Banking, § 1.  
Of street railroads, see Street Railroads, § 1.

### § 1. For occupations and privileges.

A "license" may be defined as a permit, granted by the sovereign generally for a consideration, to a person, firm, or corporation to pursue some occupation or to carry on some business subject to regulation under the police power.—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; *In re Central Bank & Trust Co.*, *Id.*

## LIFE EXPECTANCY.

See Death, § 1.

## LIFE INSURANCE.

See Insurance, § 2.

## LIMITATION OF ACTIONS.

See Prescription.

## LIQUIDATED DAMAGES.

See Damages, § 2.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LITIGIOUS RIGHTS.

Promissory notes are not rendered litigious by being transferred for low price.—*Bernheim v. Pessou*, 609.

## LOCAL ACTIONS.

See Venue, § 1.

## LOCAL ASSESSMENTS.

Appellate jurisdiction of supreme court, see Courts, § 2.

## MAIL.

Presumption as to regularity of course of, see Evidence, § 1.

## MANDAMUS.

### § 1. Nature and grounds in general.

Mandamus will not issue to control discretion of trial court in granting new trial; appeal being the only remedy.—*New Orleans Silica Brick Co. v. John Thatcher & Son*, 442; *In re New Orleans Silica Brick Co.*, *Id.*

### § 2. Subjects and purposes of relief.

Since the law confers on the Railroad Commission authority to penalize railroads (Act No. 175 of 1912) leaves the matter to the discretion of the commission, such discretion of a judicial or quasi judicial tribunal cannot be controlled by mandamus.—*Shreveport Window Glass Co. v. Railroad Commission of Louisiana*, 794.

## MANDATE.

See Brokers.

### § 1. Rights and liabilities as to third persons.

The test whether an act by an agent is voidable or absolutely void on its face is, not whether it might be ratified, but whether its nullity is only latent or is apparent.—*Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 743.

One who acquired note and mortgage on community property of husband and wife from his lawyers, then acting as agents of the husband in selling the note, was not charged with knowledge of any want of authority of the lawyers to negotiate the note.—*Gastauer v. Gastauer*, 749.

An agent is liable for his own torts in like manner as other persons; his liability being neither increased nor decreased by the fact of his agency.—*Burke v. Werlein*, 788.

## MANSLAUGHTER.

See Homicide.

## MARRIAGE.

See Divorce and Separation from Bed and Board; Husband and Wife.

Legitimation of issue of slaves, see Slaves.

## MARRIED WOMEN.

See Husband and Wife.

## MASTER AND SERVANT.

See Slaves.

Action by a servant of partnership for injuries, see Partnership, § 1.

Denial of equal protection of laws by act relating to defenses in employes' suits for injuries, see Constitutional Law, § 5.  
 Rulings of United States Supreme Court relating to Federal Employers' Liability Act as binding on state courts, see Courts, § 1.  
 Subject and title of Employers' Liability Act, see Statutes, § 1.  
 Trade unions, see Trade Unions.

### § 1. The relation.

Act No. 187 of 1912, in reference to defenses in employes' suits for personal injury, applying only to public service corporations, is violative of Constitutions of Louisiana and United States.—*Mason v. New Orleans Terminal Co.*, 616.

### § 2. Services and compensation.

Under Act No. 23 of 1912, foreman and filer in sawmill has a lien on material manufactured, though his wages are measured by amount of material produced, less wages to workmen under joint control of employer and foreman, as he is not an "independent contractor."—*Swain v. Kirkpatrick Lumber Co.*, 30.

Corporation's general manager, foreman of lumber yard and planing mill, and supervisor of construction and draughtsman, were not privileged creditors under Rev. Civ. Code, art. 3252, which accords a privilege to debts due for wages of servants and salaries of secretaries and clerks.—*Salaun v. Consolidated Realty & Mfg. Co.*, 593.

### § 3. Master's liability for injuries to servant.

In widow's suit for death of husband in service when killed by electric current, natural or generated, while in building on defendant's premises, petition *held* not to state cause of action, in that it did not explain why defendant was responsible for husband's presence in building.—*Arthur v. Alexandria Lumber Co.*, 207.

Widow's petition for damages, for death of husband in service, which did not allege death was by accident in course of employment, showed no cause of action under Employers' Liability Act.—*Id.*

Employer employing physician of ordinary skill to attend to employes who is paid from fund collected from employes from which employer derives no profit is not liable to employe for mistake or malpractice, if not negligent in selecting physician.—*Congdon v. Louisiana Sawmill Co.*, 209.

Petition in employe's action for damages from mistake or malpractice of physician employed by employer and paid by employes' fund, from which employer derives no profit, not alleging employer's negligence in not employing competent physician, states no cause of action.—*Id.*

Where foreman, with employer's knowledge and approval, placed crews in charge of particular members, it was immaterial that such

members were not called foremen if they discharged functions of foremen, and their negligence in not making reasonable provision for safety of crew would render employer liable.—*Miller v. Tall Timber Co.*, 269.

Railroad *held* not liable to locomotive wiper for injuries received in fall from footboard of tender of switch engine between rails, to his injury, when engine's ash pan crushed him, though engine bell was not rung and the engineer at the moment was not looking ahead.—*Winbush v. Texas & P. Ry. Co.*, 275.

It is actionable negligence for a master not to warn an inexperienced servant of the dangers of the employment, and instruct him how to avoid them.—*Meyers v. Bascle*, 383.

A carpenter and a car repairer, neither having any authority or supervision over the other, both employed by same master on same car and necessarily coming in contact with each other in course of work, are fellow servants.—*Mason v. New Orleans Terminal Co.*, 616.

In action by longshoreman against his employer, a stevedore company, for injury when a hatch fell into the hold, evidence *held* to show his negligence in assuming a dangerous position in disobedience to orders of his superiors.—*Nelson v. J. B. Honor Co.*, 629.

Express company, whose leased premises included a platform, etc., and which furnished another safe, convenient, and intended entrance and exit for its employes, was not liable to employe, injured from fall of stepladder nailed to end of platform, where there was no invitation to use it as an exit, and it was not furnished or placed by or with consent of company's officers or superior servants.—*Fischer v. Wells Fargo & Co. Express*, 1081.

### § 4. Liabilities for injuries to third persons.

One causing an excavation in a public sidewalk owes an absolute duty to protect the public from injury resulting therefrom, and cannot escape liability by showing that it was made for him by an independent contractor.—*Burke v. Werlein*, 788.

### § 5. Workmen's Compensation Act.

Servant of partnership injured as result of employment cannot maintain action against member of partnership alone for compensation under Employers' Liability Act, Act No. 20 of 1914.—*Dupre v. Coleman*, 69.

That employe injured in service arising out of and incidental to his employment was then afflicted with a dormant disease would not defeat compensation under Employers' Liability Act for injury which added to disease, superinduced physical disability.—*Behan v. John B. Honor Co.*, 348.

Where it was impracticable to compute "average weekly wages" by method first indicated in Employers' Liability Act, § 3, compensation

awarded on alternative statutory method by taking average weekly wages of another employé of same employer at same work was so nearly accurate that it would be approved.—*Id.*

The only function of Employers' Liability Act, § 12, is to stay the running of the 15 days allowed for notice of injury, and the only consequences of employer's failure to post notice is that employé has 6 months instead of 16 days, in which to give notice.—*Boyer v. Crescent Paper Box Factory*, 368.

Where employer fully complied with medical aid requirements of Employers' Liability Act, § 8, par. 5, during first two weeks after the injury, it was not estopped from invoking benefits of the act.—*Id.*

Employers' Liability Act prior to amendment by Act No. 243 of 1916, p. 512, does not provide for serious permanent injury resulting in disfigurement about the head or face, or the destruction of the usefulness or impairment of member or any physical function.—*Id.*

Employers' Liability Act, § 3, par. 3, applies where injured employé gave notice that employment should not be subject to the act only after accident, but within 30 days of date of her employment.—*Id.*

An employé scalped in a service arising out of and incidental to his employment in the course of the employer's business prior to Act No. 243 of 1916, amending Employers' Liability Act, is entitled to damages under Civ. Code, art. 2315, and not to compensation under the act.—*Id.*

Employers' Liability Act is not invalid as making employé, without his consent, a party in a contract entered into by employer with an insurance company, as the employé is thereby given additional security, and as under express provision of section 41 nullity of such provision as to contract would not nullify entire act.—*Id.*

Employers' Liability Act, § 3, par. 3, presuming contracts to have been intended to come under the act, unless a notice of a contrary intention is given by the employé 30 days before accident, is not a prescription in interest of foreign insurance companies, which Legislature is without authority to adopt.—*Id.*

Legislative power to provide, as in Employers' Liability Act, § 3, par. 3, that employé shall have no action for personal injury in the course of his employment, unless he gives employer notice thereof within reasonable time after its occurrence, cannot be doubted.—*Id.*

Employers' Liability Act is not unconstitutional because taking away an employé's right of action under the general law.—*Id.*

In widow's action for compensation under Employers' Liability Act for death of husband, an employé of a cooperage company, who temporarily went out of the building in which he worked and was killed on employer's switch

track, evidence held to show that accident did not arise out of and incidental to his employment.—*Fiske v. Brooklyn Cooperage Co.*, 455.

Under Employers' Liability Act, § 18, par. 4, holding that judge is not bound by common-law or statutory rules of evidence, claimant must prove the facts necessary to sustain his demand under section 2 of the act.—*Id.*

Employers' Liability Act, § 28, withholding compensation for injury caused by employé's willful intention to injure himself, intoxication, etc., does not exclude all other defenses.—*Id.*

It is impossible to formulate an absolute test for determining whether an accident occurred while a workman was acting within the scope of his employment, as no one test can govern all cases, and as each case must be governed by the particular facts.—*Id.*

In suit for compensation under Act No. 20 of 1914, where evidence as to amount of decedent's wages or contribution to plaintiff's support was so uncertain that compensation could not be determined, district court, in view of section 18, subsec. 4, should have been reopened to allow plaintiff to introduce additional evidence.—*Philps v. Guy Drilling Co.*, 951.

Where supplemental petition for compensation under Act No. 20 of 1914, stated nature of dispute in compliance with section 18, par. 1, plea of prescription in that original petition set forth no cause of action, and that supplemental petition was not filed within a year after accident, was without merit.—*Id.*

A demand for compensation under Act No. 20 of 1914, was not waived and will not be dismissed merely because it was urged in the alternative and only in the event the court should hold that plaintiff was not entitled to damages for tort under Civ. Code, art. 2315.—*Id.*

Under Act No. 20 of 1914, § 3, subds. 1-3, and where there was no written agreement or notice between employer and employé that act should not apply to employment, an accident occurring within 30 days after contract of employment is not excluded from its provisions.—*Id.*

Action by mother of deceased employé for compensation for his death from injury within 30 days after contract of employment was within Act No. 20 of 1914, § 34, so that a judgment refusing demand for damages for tort under Civ. Code, art. 2315, was proper.—*Id.*

Act No. 20 of 1914 plainly expressed the intention to limit rights and remedies of employés and their dependents to compensation thereby provided, and to exclude other rights; to "prescribe" meaning to lay down authoritatively as a guide or rule of action.—*Id.*

## MAYHEM.

Plea of autrefois acquit, see Criminal Law, § 9.

## MAYOR.

Authority to impose costs on person convicted of violation of municipal ordinance, see *Costs*, § 1.

## MECHANICS' PRIVILEGES.

### § 1. Nature, grounds, and subject-matter in general.

Act No. 229 of 1916, giving privilege to mechanics, builders, artisans, workmen, laborers, etc., who shall do any work on or furnish materials for any building, etc., does not repeal by implication Civ. Code, art. 3249, specifying creditors who have privilege on immovables.—*Conroy v. Pine Belt Oil Co.*, 879; *In re Conroy*, Id.

### § 2. Operation and effect.

Contractor erecting building subject to a mortgage and a vendor's lien can enforce his privilege only to extent that at foreclosure sale the building enhanced value of land, neither original cost of building or its peculiar value having any necessary bearing.—*New Orleans Land Co. v. Southern States Fair-Pan-American Exposition Co.*, 884.

## MERGER.

Of cause of action in judgment, see *Judgment*, § 5.

## METES AND BOUNDS.

See *Boundaries*, § 1.

## MILLING IN TRANSIT.

See *Carriers*, § 1.

## MINES AND MINERALS.

Application of statute of frauds to sale of property by mining company, see *Frauds*, Statute of, § 1.

Conveyance of land by mining company, see *Corporations*, § 2.

Estoppel by deed of mineral rights, see *Estoppel*, § 1.

Reformation of sale of property of mining company, see *Reformation of Instruments*, § 1.

### § 1. Title, conveyances, and contracts.

Where, when oil lease was executed from plaintiffs to defendant oil company, land on which well had been drilled was claimed by another defendant company, which believed well was inside its boundary line, though neither it nor plaintiffs know truth of matter, there is presumption well was included in lease.—*Russell v. Producers' Oil Co.*, 217.

The ownership of the surface of the earth carries with it the right to the minerals beneath and the consequent privilege of mining and extracting them.—*De Moss v. Sample*, 243.

In view of Civ. Code, arts. 484, 505, the elements of ownership in land may be severed and the owner may sell surface rights and except from the sale the minerals below the surface, whether they are in place, like coal, etc., or are migratory, like oil and gas.—Id.

In suit by oil company against another to enjoin interference with leased oil lands, burden was on plaintiff to establish it had made timely deposit in bank to renew lease for another year.—*Pure Oil Operating Co. v. Gulf Refining Co. of Louisiana*, 284.

In suit by oil company to enjoin another company from interfering with possession of oil land leased, evidence held insufficient to show plaintiff made timely deposit in bank to renew its lease for another year.—Id.

## MINORS.

See *Parent and Child*.

Contributory negligence on part of children, see *Negligence*, § 2.

Suspension of prescription during minority, see *Prescription*, § 3.

### § 1. Custody and protection.

In view of Const. art. 118, §§ 2, 3, a person over 17 years of age must be charged and tried in the district court, although at the time of the commission of the criminal offense he may have been under 17 years of age.—*State v. Ebarbo*, 591.

### § 2. Property and conveyances.

Where property belonging jointly to major and minor children of a deceased was sold by the natural tutrix of the minor children under an order of court, but without the advice of a family meeting to pay succession debts, one of such minors suing after majority was entitled to his interest in the property so sold.—*Delouche v. Rosenthal*, 581.

A purchaser of property sold by the natural tutrix of minor children upon an order of court, though without the advice of a family meeting, acquired a title prima facie valid, and was not a purchaser in bad faith merely because his title was invalid.—Id.

Any deviation from mandate of Act No. 25 of 1878, authorizing sale of interest of minors in real property held in common with others, works an absolute nullity of the sale of minors' property.—*Brinkman v. Succession of Posey*, 924.

### § 3. Actions.

A surviving parent, who is not the qualified tutor or tutrix of his or her minor child, within Civ. Code, art. 363, cannot sue on behalf of such minor child.—*Koepping v. Monteleone*, 353.



## MISREPRESENTATION.

By insured, see Insurance, § 1.

## MONEY RECEIVED.

Recovery of price paid for land, see Sales, § 10.

## MOOT QUESTION.

Interpretation of rules of carriers, see Carriers, § 1.

## MORTALITY TABLES.

As evidence in action for causing death, see Death, § 1.

## MORTGAGES.

Discharge of notes secured by, see Bills and Notes, § 2.

Former judgment as bar to action to annul mortgage, see Judgment, § 5.

Judicial mortgage on property judicially sold, see Judicial Sales.

Of community property, see Husband and Wife, § 5.

Privilege of contractor erecting building subject to mortgage, see Mechanics' Privileges, § 2.

Purchase by notary of note secured by mortgage passed before him, see Bills and Notes, § 1.

### § 1. Payment or performance of condition, release, and satisfaction.

In suits on note and mortgage, evidence held to show that, even if bank agreed with defendant not to sell property, it was merely friendly promise not intended to last more than few months, nor to be binding further than bank could carry it out without inconvenience.—*Bernheim v. Pessou*, 609.

Where mortgagor was released from obligation on mortgage note, mortgage securing note ceased to exist.—*Id.*

### § 2. Foreclosure by action.

Suit to foreclose mortgage is not in personam within Code Prac. art. 26, defining action in personam to be where debtor has bound himself towards another, personally and independently of his property.—*Beck v. Natalie Oil Co.*, 153.

A petition to restrain foreclosure proceedings alleging that mortgagee before whom the act of mortgage was passed, could not at same time act as notary and lender and give to himself a mortgage, without alleging that he did act as a notary and lender, did not set forth a cause for an injunction.—*Dreyfous v. Papalia*, 530.

A suit to annul a mortgage and to annul executory process proceedings and sheriff's sale

is a 'direct attack on the sale.—*St. John Lumber Co. v. Federal Nat. Bank*, 693.

A suit to annul a mortgage, executory process proceedings and sheriff's sale, cannot be maintained in the absence of the parties to the sale, including the seizing creditor.—*Id.*

The only questions triable on an appeal from an order of executory process are those involving the regularity of the proceedings on their face.—*Id.*

## MOTIONS.

For new trial in criminal prosecutions, see Criminal Law, § 13.

Relating to pleadings, see Pleading, § 7.

## MOVABLES.

See Sales, § 1.

## MUNICIPAL CORPORATIONS.

See Schools and School Districts, § 1.

Appellate jurisdiction of supreme court in proceedings for violation of ordinances, see Courts, § 2.

Appellate jurisdiction of supreme court of proceedings to have election declared void, see Courts, § 2.

Authority to impose costs on person convicted of violation of municipal ordinance, see Costs, § 1.

Dedication of streets, see Dedication.

Highway taxes, see Highways, § 1.

Presentation in lower court of objections for purpose of review in action for paving assessment, see Appeal, § 3.

Street railroads, see Street Railroads.

### § 1. Proceedings of council or other governing body.

Section 1 of an ordinance declaring it unlawful to operate a house of prostitution, being plain and legal, with a penalty provided by section 6, one condemned under section 1 cannot sustain an objection of illegality to whole ordinance, on ground that other sections, are illegal.—*City of New Orleans v. White*, 487.

### § 2. Officers, agents, and employés.

Sewerage and water board of city of New Orleans, mere agency for more convenient administration of sewerage and water business of city, is not a "municipal corporation."—*State v. Servat*, 175.

### § 3. Public improvements.

Assessment for paving and curbing improvement held not invalid because ordinance calling for bids declared that it was to be let for work to be completed within one year from award of contract, and contract allowed contractor one year from date thereof to complete work.—*Town of Winnfield v. Collins*, 493.

Where clerk, on adoption of ordinance accepting paving work and levying assessment, neglected to record the ye and nay vote, the omission and the correction of record did not injure a person assessed, and correction should have same effect as such record at proper time would have had.—*Id.*

Under Act No. 147 of 1902, § 2, an assessment for a paving and curbing improvement was not illegal because the ordinance levying it was not enacted before the municipal council ordered the work to be done.—*Id.*

In suit by town for benefit of contractor for paving work, defendant's contention that work was not completed within one year from date of the contract *held* not supported by the evidence.—*Id.*

#### § 4. Police power and regulations.

The law does not require that ordinances should grade misdemeanors or minor offenses.—*City of New Orleans v. White*, 487.

Municipal authority to prohibit location and maintenance of establishments where any unwholesome business is carried on and to restrict them within certain limits includes authority to prohibit undertaking business on residence street, where not theretofore conducted.—*Osborn v. City of Shreveport*, 932.

Without any prohibitive ordinance, an undertaker may be prevented from establishing his business among residences where such business has not theretofore been conducted.—*Id.*

#### § 5. Use and regulation of public places, property, and works.

In action by a police traffic officer for injury to plaintiff's foot by defendant's automobile, *held*, that plaintiff's injury was attributable to his own negligence in suddenly running against the automobile.—*Anderson v. Clesi*, 570.

In action for damages by parents of a boy, killed when struck by defendant's automobile when his chauffeur was attempting to pass at a prohibited speed, *held*, on the evidence, that the accident was attributable to the boy's negligence.—*Elmendorf v. Clark*, 971.

Owner, placing automobile in charge of chauffeur not qualified under ordinance, who negligently, in violation of ordinance, and at a prohibited speed, attempted to pass children, and struck and killed one, would be liable in damages; the violation of ordinance being the proximate cause.—*Id.*

Negligence, resulting from the violation of an ordinance fixing the age of a chauffeur, affords a cause of action only in the absence of contributory negligence on the part of one struck and killed by automobile.—*Id.*

Negligence, resulting from violation of an ordinance fixing the age of chauffeurs, would afford a cause of action only if, after the contributory negligence of the one struck had

ceased, there was a last clear chance of avoiding the accident.—*Id.*

#### § 6. Offenses and quasi offenses.

It is not negligence on the part of a city not to put rails at the ends of all bridges which cross drains in the city.—*Foreman v. City of Crowley*, 654.

An excavation in a public sidewalk is intrinsically dangerous, and is a nuisance.—*Burke v. Werlein*, 788.

Even if policeman employed by defendant city committed a private wrong against plaintiff, the defendant city would not be liable therefor in damages.—*Jones v. City of New Orleans*, 1073.

A policeman in performance of his duties is a governmental agent, and his negligence while acting in that capacity cannot give rise to an action in damages *ex delicto* against municipal corporation which employs him.—*Id.*

A policeman employed by defendant city and assigned to special duty under city's Public Belt Railroad Commission, and whose salary may have been paid by revenue accruing to that department whether an employé of commission in a governmental function or an ordinary policeman, could not render city liable for damages *ex delicto* for his negligence.—*Id.*

City of New Orleans in operating a belt railroad, as required by Act No. 179 of 1908, § 3, subject to the right of board of commissioners of the Port of New Orleans to operate it on the city's failure, in acquiring, owning, and operating it, was engaged in a governmental function.—*Id.*

A municipal corporation maintaining open ditches and a wooden culvert, conducting drainage water to a point diagonally across the intersection of streets on which system of drainage was inadequate, was not liable for the death of an unattended child about four years old, who fell into the ditch and was drawn into the culvert and drowned, by reason of its failure to have a grating at the end of the culvert.—*Biegel v. City of New Orleans*, 1077.

Municipal corporations cannot foresee or guard against all dangers incident to the rashness of children and are not insurers of the lives or safety of children.—*Id.*

Municipal authorities may presume that for every child under the age of discretion there is some one of matured judgment on whom rests the special duty and responsibility for the safety of the child.—*Id.*

#### § 7. Fiscal management, public debt, securities, and taxation.

After city had made assessment roll for 1918 by copying state assessment roll, it was without authority to supplement assessment roll by adding plaintiff's theater, under Act No. 69 of 1908, which is not applicable to towns and cities.—*Elks Theater Co. v. City of New Iberia*, 162.

In view of Const. art. 281, as amended in 1914, Act No. 192 of 1914, validating all municipal bonds on certain express conditions, courts are deprived of jurisdiction to entertain any contest wherein validity or constitutionality of such bonds are questioned.—*Badger-Louisiana Land Co. v. Estopinal*, 775.

## MURDER.

See Homicide.

## MUTUALITY.

Of contracts, see Contracts, § 1.

## NAMES.

Of corporations, see Corporations, § 1.

## NATIONAL BANKS.

See Banks and Banking, § 2.

Surety bonds of bank officers or employes, see Suretyship.

Taxation of, see Taxation, § 1.

## NATURAL GAS.

See Gas.

## NAVIGABLE WATERS.

See Canals.

## NEGLIGENCE.

Causing death, see Death, § 1.

*By particular classes of persons.*

See Carriers, § 2; Municipal Corporations, § 6.

Employers, see Master and Servant, § 3.

Persons using streets, see Municipal Corporations, § 5.

Policemen, see Municipal Corporations, § 6.

Railroad companies, see Railroads, § 3.

*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See Railroads, § 3; Street Railroads, § 1.

Demised premises, see Landlord and Tenant, § 2.

Production, supply, and use of gas, see Gas.

*Contributory negligence.*

Of person injured by operation of railroad, see Railroads, § 3.

### § 1. Acts or omissions constituting negligence.

Railroad held not liable under attractive appliance doctrine for death of little girl by drown-

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ing in pool of water on its right of way, but out of sight, and invisible to child except when trespassing on tracks.—*Fincher v. Chicago, R. I. & P. Ry. Co.*, 164.

“Ordinary care” is not a constant, but a varying, condition, dependent upon each particular case and proportioned to the dangerous nature of the instrumentality employed and the probability of injury.—*Tyer v. Gulf, C. & S. F. Ry. Co.*, 177.

A property owner owes no duty to trespassers except to avoid injuring them willfully, and is not obliged to guard his premises against intrusion.—*Tomlinson v. Vicksburg, S. & P. Ry. Co.*, 641.

Doctrine of responsibility for having on one's premises an inviting or attractive danger to children is confined to cases where dangerous agency is so obviously tempting to children that owner is negligent in failing to observe and guard against the temptation and danger.—*Id.*

A pile of cross-ties on railroad right of way, near a public street, was not so inviting or attractive a danger and temptation to small children to play about it that it was negligent for railroad to fail to observe and guard against danger of injury to them.—*Id.*

### § 2. Contributory negligence.

To enforce the doctrine of the last clear chance, plaintiff must clearly show that defendant, after seeing the danger, could have avoided it by ordinary care, or, if he did not see it, that he might in exercise of ordinary care have seen it in time to avoid injury.—*Tyer v. Gulf, C. & S. F. Ry. Co.*, 177.

An infant under four years cannot be blamed for negligence.—*Biegel v. City of New Orleans*, 1077.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## NEWLY DISCOVERED EVIDENCE.

Remand of case on appeal to allow introduction of, see Appeal, § 10.

## NEW TRIAL.

Certiorari to review rulings, see Certiorari, § 1. In criminal prosecutions, see Criminal Law, § 13.

Mandamus to control discretion of court in granting, see Mandamus, § 1.

### § 1. Proceedings at new trial.

Although jury on second trial, ordered mainly to permit a showing of contributory negligence, was not bound by verdict found in previous trial, it could not increase verdict on ground that defendant, alleging contributory

negligence on part of deceased employé, failed to produce any evidence thereof.—*Jones v. Kansas City Southern Ry. Co.*, 307.

## NEXT OF KIN.

See Succession.

## NONRESIDENCE.

Effect on prescription, see Prescription, § 3.

## NONSUIT.

Before trial, see Dismissal and Nonsuit.

## NOTARIAL ACTS.

See Bills and Notes, § 1.

Estoppel by, see Estoppel, § 1.

## NOTARIES.

Purchase of note by notary passing notarial act, see Bills and Notes, § 1.

## NOTES.

Promissory notes, see Bills and Notes.

## NOTICE.

Of injury to servant, see Master and Servant, § 5.

Of tax delinquency, see Taxation, § 9.

To purchaser of land, see Sales, § 8.

## NUISANCE.

### § 1. Private nuisances.

Where a structure, intended for use as a stable, is not shown to be a nuisance, as actually used, or likely to become a nuisance if when used as intended, an injunction prohibiting such intended use is properly dismissed.—*Hill v. Battalion Washington Artillery of City of New Orleans*, 533.

## NULLITY.

See Cancellation of Instruments.

Of sale of state land, see States, § 1.

Setting aside conveyance in fraud of creditors, see Fraudulent Conveyances, § 1.

## OBJECTIONS.

To evidence, see Trial, § 1.

## OBLIGATION OF CONTRACTS.

Laws impairing, see Constitutional Law, § 3.

## OFFENSES AND QUASI OFFENSES.

Where escape of natural gas from pipe lines could be heard and, when lighted, seen, owner, not learning of leak until injury to child, and whose perfunctory inspection was not likely to have informed it of leak, was negligent in not discovering leak, and liable for injury.—*Jackson v. Texas Co.*, 21.

Doctrine that occupier of land need not make it safe for children coming on it without invitation does not apply where occupier takes no steps to inform public of natural gas pipe line under land appearing to be a highway, where escape of gas results in injury to child.—*Id.*

Where company negligently allowed leak in its natural gas pipe line on land used as highway by small children, who were attracted by escaping gas, though not capable of appreciating probable consequences, and one lit it at request of another who was burned, company's negligence was proximate cause of injury.—*Id.*

Owner of pipe line, conveying so dangerous fluid as natural gas through what appears to be, and is used as, public highway, must exercise care commensurate with danger to protect public in person and property from injury.—*Id.*

Allegations in petition against sheriff and surety on his bond, prescribed by Act No. 52 of 1880, that deputy maliciously and recklessly shot and wounded plaintiff, not charging that deputy's act was in violation of an official duty or an improper performance of an official act, did not show cause of action.—*Sanders v. Humphries*, 43.

Surety on sheriff's official bond prescribed by Act No. 52 of 1880 is not liable for damages for personal injury to citizen inflicted recklessly by a deputy sheriff, unless it was done in violation of an official duty or in an unfaithful and improper performance of an official act.—*Id.*

Sheriff is not liable for damages for personal injury to a citizen inflicted recklessly by a deputy sheriff, unless it was done in violation of an official duty or in an unfaithful and improper performance of an official act.—*Id.*

In action by widow of one killed while lying between rails of track, evidence held not to show want of exercise of ordinary care on part of defendant's engineer after dangerous position of deceased was or should have been discovered by him.—*Rogers v. Louisiana Ry. & Nav. Co.*, 58.

Where presence of deceased who was lying down between rails of track was unaccounted for, it would be assumed as legal conclusion that he was guilty of gross negligence amounting to recklessness.—*Id.*

Where deceased, killed while lying between rails of track, was guilty of gross negligence, his widow could recover only if she showed that accident might have been avoided by exercise of ordinary care by defendant's engineer after danger of situation was or should have been discovered.—*Id.*

A landlord is not liable in damages for personal injuries suffered by the tenant in consequence of a dangerous condition of the leased premises, of which the tenant had knowledge and assumed the risk.—*McLaughlin v. Stallings*, 62.

Servant of partnership injured as result of employment cannot maintain action against member of partnership alone for compensation under Employers' Liability Act, Act No. 20 of 1914.—*Dupre v. Coleman*, 69.

Servant of partnership injured as result of employment cannot maintain action against member of partnership alone, either for damages for employer's neglect to perform a duty of furnishing safe place and tools required by Civ. Code, art. 2315, or for compensation under Employers' Liability Act, Act No. 20 of 1914, for disability on allegation that individual defendant was the employer.—*Id.*

Where street car stopped 15 or 20 feet beyond its usual stopping place at place where step of car was 15½ or 16 inches above roadway, so that passenger might safely alight by extending foot 7 inches out and stepping down while holding onto handlebar, such place was reasonably safe.—*Clogher v. New Orleans Ry. & Light Co.*, 85.

Common carriers must exercise the strictest diligence in setting down a passenger as safely as means of conveyance and circumstances will permit, which duty is more incumbent upon it when conveyance is stopped at unusual and dangerous place.—*Id.*

It is not negligence for street car company to stop its car either short of or beyond regular stopping place, if place where car is stopped is not precisely similar to that at regular stopping place.—*Id.*

Damages will be awarded to owner of plantation for act of violence which results in driving tenant planting on shares from his plantation.—*Sandlin v. Coyle*, 121.

In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, plea of estoppel, based on owner's effort to dissuade defendants and his inviting them into his house, not showing consent to their unlawful purpose, was without merit.—*Id.*

In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, evidence *held* not to sustain claim for damages for vexation and humiliation.—*Id.*

In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, evidence *held* not to sustain claim for damages suffered by plaintiff through illness of his wife.—*Id.*

In action by owner of plantation for damages for acts of violence driving away a tenant planting on shares, wherein the wife of owner intervened, evidence *held* not to support her claim for \$1,000 damages for shock, annoyance, sickness, and prolonged mental suffering.—*Id.*

Where plaintiff sought damages of \$2,950 and excepted to dismissal of \$1,000 of such claim and his wife subsequently intervened and demanded \$1,000 and adopted allegations of husband's petition, and demands of plaintiff and intervenor were rejected in one verdict and judgment, amount involved exceeded \$2,000, and appeal would not be dismissed.—*Id.*

Railroad *held* not liable under attractive appliance doctrine for death of little girl by drowning in pool of water on its right of way, but out of sight, and invisible to child except when trespassing on tracks.—*Fincher v. Chicago, R. I. & P. Ry. Co.*, 164.

In an action for damages for death of plaintiff's husband alleged to have been killed by the reckless, wanton, and negligent act of defendant railroad, evidence *held* not to show that death was caused by defendant's negligence.—*Granger v. Illinois Cent. Ry. Co.*, 168.

Where one recklessly lies down on a railroad track and at such a time and place that in the exercise of ordinary care an engineer could not discern his presence in time to avoid striking him, his widow and heirs cannot recover from railroad.—*Tyer v. Gulf, C. & S. F. Ry. Co.*, 177.

To enforce the doctrine of the last clear chance, plaintiff must clearly show that defendant, after seeing the danger, could have avoided it by ordinary care, or, if he did not see it, that he might in exercise of ordinary care have seen it in time to avoid injury.—*Id.*

"Ordinary care" is not a constant, but a varying, condition, dependent upon each particular case and proportioned to the dangerous nature of the instrumentality employed and the probability of injury.—*Id.*

In action for damages for death of plaintiffs' son who was run over by defendant's train while he was asleep beside the track, evidence *held* not to show that engineer was negligent in failing to see deceased in time to avoid accident.—*Hyde v. Texas & P. Ry. Co.*, 185.

Engineer's failure to blow whistle when he saw boy asleep beside the track, if error of judgment, would not be considered negligence in such emergency.—*Id.*

Widow's petition for damages, for death of husband in service, which did not allege death was by accident in course of employment, showed no cause of action under Employers'

Liability Act.—*Arthur v. Alexandria Lumber Co.*, 207.

In widow's suit for death of husband in service when killed by electric current, natural or generated, while in building on defendant's premises, petition *held* not to state cause of action, in that it did not explain why defendant was responsible for husband's presence in building.—*Id.*

In widow's suit for husband's death in service, allegation that husband had right to be in building where he was killed was mere conclusion of law, which cannot be made to serve for allegation of necessary fact.—*Id.*

Employer employing physician of ordinary skill to attend to employes who is paid from fund collected from employes from which employer derives no profit is not liable to employe for mistake or malpractice, if not negligent in selecting physician.—*Congdon v. Louisiana Sawmill Co.*, 209.

Petition in employe's action for damages from mistake or malpractice of physician employed by employer and paid by employes' fund, from which employer derives no profit, not alleging employer's negligence in not employing competent physician, states no cause of action.—*Id.*

Where foreman, with employer's knowledge and approval, placed crews in charge of particular members, it was immaterial that such members were not called foremen if they discharged functions of foremen, and their negligence in not making reasonable provision for safety of crew would render employer liable.—*Miller v. Tall Timber Co.*, 269.

A carpenter sustaining a bruised and strained knee, who was laid up for two months suffering some pain and a diminished earning capacity, would be awarded \$1,500.—*Id.*

Railroad *held* not liable to locomotive wiper for injuries received in fall from footboard of tender of switch engine between rails, to his injury, when engine's ash pan crushed him, though engine bell was not rung and the engineer at the moment was not looking ahead.—*Winbush v. Texas & P. Ry. Co.*, 275.

Where it was impossible for the engineer of the train which struck plaintiff to have seen the danger in time to have avoided the accident, the doctrine of last clear chance had no application.—*Loewe v. Kansas City Southern Ry. Co.*, 281.

Plaintiff injured by incoming train after alighting from standing train, which he had boarded to talk to passenger, and who knew the conditions and had been warned of danger, *held* guilty of contributory negligence defeating a recovery.—*Id.*

Although jury on second trial, ordered mainly to permit a showing of contributory negligence, was not bound by verdict found in previous trial, it could not increase verdict on ground that defendant, alleging contributory

negligence on part of deceased employe, failed to produce any evidence thereof.—*Jones v. Kansas City Southern Ry. Co.*, 307.

The jury is not required by the federal Employers' Liability Act to apportion the award of damages among the beneficiaries of the deceased employe.—*Id.*

Recovery under federal Employers' Liability Act, being limited to pecuniary loss to beneficiaries, is to be computed by discounting lost future benefits at fair rate at which money might be loaned or invested safely at interest for each year of life expectancy.—*Id.*

In determining life expectancy of locomotive engineer according to expectation table constructed from American Experience Table of Mortality, court would adopt rule of insurance companies of adding eight years to age because of hazardous occupation.—*Id.*

Present value of future benefits lost by beneficiary of deceased employe under federal Employers' Liability Act is found by multiplying difference between his annual wages and annual cost of his maintenance by number of years of his life expectancy, and discounting result at 5 per cent. annually for his expectancy.—*Id.*

State courts are bound under rulings of Supreme Court of United States to fix compensation to beneficiaries of deceased employe under federal Employers' Liability Act at present or cash value of what employe might reasonably have contributed to their support during his life expectancy.—*Id.*

Where it was impractical to compute "average weekly wages" by method first indicated in Employers' Liability Act, § 3, compensation awarded on alternative statutory method by taking average weekly wages of another employe of same employer at same work was so nearly accurate that it would be approved.—*Behan v. John B. Honor Co.*, 348.

That employe injured in service arising out of and incidental to his employment was then afflicted with a dormant disease would not defeat compensation under Employers' Liability Act for injury which added to disease, superinduced physical disability.—*Id.*

Employers' Liability Act expresses the object in its title, to which object everything contained in the act is germane, and hence is not unconstitutional because containing more than one object, and because several objects contained therein are not expressed in its title.—*Boyer v. Crescent Paper Box Factory*, 368.

Employers' Liability Act, § 3, par. 3, applies where injured employe gave notice that employment should not be subject to the act only after accident, but within 30 days of date of her employment.—*Id.*

The only function of Employers' Liability Act, § 12, is to stay the running of the 15 days allowed for notice of injury, and the only

consequences of employer's failure to post notice is that employé has 6 months, instead of 16 days in which to give notice.—*Id.*

Where employer fully complied with medical aid requirements of Employers' Liability Act, § 8, par. 5, during first two weeks after the injury, it was not estopped from invoking benefits of the act.—*Id.*

Employers' Liability Act prior to amendment by Act No. 243 of 1916, p. 512, does not provide for serious permanent injury resulting in disfigurement about the head or face, or the destruction of the usefulness or impairment of member or any physical function.—*Id.*

Employers' Liability Act is not invalid as making employé, without his consent, a party in a contract entered into by employer with an insurance company, as the employé is thereby given additional security, and as under express provision of section 41 nullity of such provision as to contract would not nullify entire act.—*Id.*

Employers' Liability Act, § 3, par. 3, presuming contracts to have been intended to come under the act, unless a notice of a contrary intention is given by the employé 30 days before accident, is not a prescription in interest of foreign insurance companies, which Legislature is without authority to adopt.—*Id.*

Legislative power to provide, as in Employers' Liability Act, § 3, par. 3, that employé shall have no action for personal injury in the course of his employment, unless he gives employer notice thereof within reasonable time after its occurrence, cannot be doubted.—*Id.*

Employers' Liability Act is not unconstitutional because taking away an employé's right of action under the general law.—*Id.*

An employé scalped in a service arising out of and incidental to his employment in the course of the employer's business prior to Act No. 243 of 1916, amending Employers' Liability Act, is entitled to damages under Civ. Code, art. 2315, and not to compensation under the act.—*Id.*

It is actionable negligence for a master not to warn an inexperienced servant of the dangers of the employment, and instruct him how to avoid them.—*Meyers v. Basile*, 383.

In action against railroad for injuries at crossing, burden of pleading contributory negligence is on railroad, not on injured person.—*Maier v. Louisiana Ry. & Nav. Co.*, 386.

In action against railroad for injuries at crossing, petition should show absence of design on part of injured person to bring about accident, which is done by allegation he was in no wise at fault.—*Id.*

One run down by railroad train on street crossing is not necessarily at fault, but only so if he contributed to event by his negligence.—*Id.*

In an action for personal injury when defendant's railroad motorcar struck the buggy

in which plaintiff was riding and injured him, evidence held not to show that defendant flagman had given warning in time to prevent the accident.—*Lincks v. Illinois Cent. R. Co.*, 445.

Where a railroad continuously kept a flagman at a crossing where the view of passing trains was obstructed, one who was familiar with such conditions might rely on the flagman's warning.—*Id.*

Employers' Liability Act, § 28, withholding compensation for injury caused by employé's willful intention to injure himself, intoxication, etc., does not exclude all other defenses.—*Piske v. Brooklyn Cooperage Co.*, 455.

In widow's action for compensation under Employers' Liability Act for death of husband, an employé of a cooperage company, who temporarily went out of the building in which he worked and was killed on employer's switch track, evidence held to show that accident did not arise out of and incidental to his employment.—*Id.*

Under Employers' Liability Act, § 18, par. 4, holding that judge is not bound by common-law or statutory rules of evidence, claimant must prove the facts necessary to sustain his demand under section 2 of the act.—*Id.*

It is impossible to formulate an absolute test for determining whether an accident occurred while a workman was acting within the scope of his employment, as no one test can govern all cases, and as each case must be governed by the particular facts.—*Id.*

Where terminal company obligated by contract with railroad company to provide for safe movements of trains, through its employes ran train into train of railroad company, it was liable for breach of contract though its act was a tort, and limitations of one year relating to torts were not applicable, where action was grounded on contract.—*Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 467; *In re New Orleans Terminal Co.*, *Id.*

In railroad's action against terminal company for damages through collision of trains, petition's allegation that collision was due entirely to action of defendant's employes was equivalent to allegation it was not by orders of train dispatcher, joint employé of parties, that guilty train was on wrong track.—*Id.*

For a tort all damages resulting directly from the act of negligence may be recovered.—*Id.*

Petition alleging that defendant unlawfully trespassed upon plaintiff's premises, took unlawful possession of plaintiff's property on a writ of sequestration, and moved it from the premises to defendant's place of business, held to state a cause of action.—*Oubre v. Katz*, 501.

In action for trespass in illegally entering plaintiff's home and taking illegal possession of their personal property, a plea of estoppel to part of petition asking damages for wrongful issuance of a writ of sequestration was

properly sustained, where plaintiffs had paid the claim demanded in that suit.—*Id.*

In an action for trespass on plaintiffs' premises, and the taking possession of and removal of their property, a plea of estoppel based on plaintiff's payment of a demand in a sequestration suit was wrongfully sustained, as to the claim for damages from the trespass.—*Id.*

Where a structure, intended for use as a stable, is not shown to be a nuisance, as actually used, or likely to become a nuisance if when used as intended, an injunction prohibiting such intended use is properly dismissed.—*Hill v. Battalion Washington Artillery of City of New Orleans*, 533.

In action by a police traffic officer for injury to plaintiff's foot by defendant's automobile, *held*, that plaintiff's injury was attributable to his own negligence in suddenly running against the automobile.—*Anderson v. Clesi*, 570.

In action for physical injury sustained by a female passenger on defendant's street car when it collided with another car, resulting in a nervous shock peculiar to women and some physical discomfort, a verdict of \$200 increased to \$300 on appeal.—*Favalora v. New Orleans Ry. & Light Co.*, 572.

Act No. 187 of 1912, in reference to defenses in employes' suits for personal injury, applying only to public service corporations, is violative of Constitutions of Louisiana and United States.—*Mason v. New Orleans Terminal Co.*, 616.

A carpenter and a car repairer, neither having any authority or supervision over the other, both employed by same master on same car and necessarily coming in contact with each other in course of work, are fellow-servants.—*Id.*

Act No. 187 of 1912, entitled "An act in reference to defenses in suits for damages for personal injury," not referring to public service corporations, although such corporations only are dealt with in the act, does not express the object of the act.—*Id.*

Act No. 187 of 1912 in reference to defense in employes' suits for personal injury, applying only to public service corporations, is violative of Constitutions of Louisiana and United States, in that it denied equal protection of the laws.—*Id.*

In action by longshoreman against his employer, a stevedore company, for injury when a hatch fell into the hold, evidence *held* to show his negligence in assuming a dangerous position in disobedience to orders of his superiors.—*Nelson v. J. B. Honor Co.*, 629.

In an action for slander based on words slanderous per se, *held*, on the evidence as to defendant's utterance of such words, that the plaintiff's demand was properly rejected and the suit dismissed.—*Basile v. Ventura*, 639.

Doctrine of responsibility for having on one's premises an inviting or attractive danger to children is confined to cases where dangerous agency is so obviously tempting to children that owner is negligent in failing to observe and guard against the temptation and danger.—*Tomlinson v. Vicksburg, S. & P. Ry. Co.*, 641.

A pile of cross-ties on railroad right of way, near a public street, was not so inviting or attractive a danger and temptation to small children to play about it that it was negligent for railroad to fail to observe and guard against danger of injury to them.—*Id.*

A property owner owes no duty to trespassers except to avoid injuring them willfully, and is not obliged to guard his premises against intrusion.—*Id.*

When amount sued for reduced by abandonment of a claim for punitive damages, leaves the amount in dispute less than \$2,000, but within jurisdiction of the Court of Appeal, the Supreme Court, under Act No. 19 of 1912, will transfer the cause to that court.—*Southern Scrap Material Co. v. Liquidating Comrs of Carondelet Canal & Navigation Co.*, 647.

It is not negligence on the part of a city not to put rails at the ends of all bridges which cross drains in the city.—*Foreman v. City of Crowley*, 654.

Under former decision against plaintiff company on its charge that defendants trespassed on navigable waters and streams within its grants, exception of no cause of action pleaded against its supplemental and amended petition, charging no other trespass, was properly sustained.—*Louisiana Navigation Co. v. Oyster Commission of La.*, 664.

One obtaining a sequestration of lumber manufactured by an adverse claimant of timber after writ was dissolved and timber manufactured cannot maintain action against adverse claimant for possession of lumber or for its value merely on his allegation of possession as owner.—*Burton-Swartz Cypress Co. v. Baker-Wakefield Cypress Co.*, 686.

A motorman is justified in assuming, even until it is too late to avoid an accident, that one approaching the track and whose view is obstructed will heed the apparent danger and have some regard for his own safety.—*Sammons v. New Orleans Ry. & Light Co.*, 731.

If street car was being run too fast when approaching a street, which danger was apparent to a pedestrian whose subsequent negligence was direct cause of fatal injury he had last clear chance to avoid the accident, and his children could not recover.—*Id.*

One causing an excavation in a public sidewalk owes an absolute duty to protect the public from injury resulting therefrom, and cannot escape liability by showing that it was made for him by an independent contractor.—*Burke v. Werlein*, 788.



An agent is liable for his own torts in like manner as other persons; his liability being neither increased nor decreased by the fact of his agency.—*Id.*

An excavation in a public sidewalk is intrinsically dangerous, and is a nuisance.—*Id.*

Where injury to plaintiff's foot was not permanent, and his physical suffering was not continuous or of long duration at any time, and his detention from business was slight, and he suffered no pecuniary loss, a verdict of \$750 was adequate.—*Id.*

Where supplemental petition for compensation under Act No. 20 of 1914, stated nature of dispute in compliance with section 18, par. 1, plea of prescription in that original petition set forth no cause of action, and that supplemental petition was not filed within a year after accident, was without merit.—*Philps v. Guy Drilling Co.*, 951.

A demand for compensation under Act No. 20 of 1914, was not waived and will not be dismissed merely because it was urged in the alternative and only in the event the court should hold that plaintiff was not entitled to damages for tort under Civ. Code, art. 2315.—*Id.*

In suit for compensation under Act No. 20 of 1914, where evidence as to amount of decedent's wages or contribution to plaintiff's support was so uncertain that compensation could not be determined, district court, in view of section 18, subsec. 4, should have been reopened to allow plaintiff to introduce additional evidence.—*Id.*

Under Act No. 20 of 1914, § 3, subds. 1-3, and where there was no written agreement or notice between employer and employé that act should not apply to employment, an accident occurring within 30 days after contract of employment is not excluded from its provisions.—*Id.*

Action by mother of deceased employé for compensation for his death from injury within 30 days after contract of employment was within Act No. 20 of 1914, § 34, so that a judgment refusing demand for damages for tort under Civ. Code, art. 2315, was proper.—*Id.*

Act No. 20 of 1914 plainly expressed the intention to limit rights and remedies of employes and their dependents to compensation thereby provided, and to exclude other rights; to "prescribe" meaning to lay down authoritatively as a guide or rule of action.—*Id.*

Negligence, resulting from the violation of an ordinance fixing the age of a chauffeur, affords a cause of action only in the absence of contributory negligence on the part of one struck and killed by automobile.—*Elmendorf v. Clark*, 971.

Negligence, resulting from violation of an ordinance fixing the age of chauffeurs, would afford a cause of action only if, after the contributory negligence of the one struck had

ceased, there was a last clear chance of avoiding the accident.—*Id.*

Owner, placing automobile in charge of chauffeur not qualified under ordinance, who negligently, in violation of ordinance, and at a prohibited speed, attempted to pass children, and struck and killed one, would be liable in damages; the violation of ordinance being the proximate cause.—*Id.*

In action for damages by parents of a boy, killed when struck by defendant's automobile when his chauffeur was attempting to pass at a prohibited speed, *held*, on the evidence, that the accident was attributable to the boy's negligence.—*Id.*

Even if policeman employed by defendant city committed a private wrong against plaintiff, the defendant city would not be liable therefor in damages.—*Jones v. City of New Orleans*, 1073.

A policeman in performance of his duties is a governmental agent, and his negligence while acting in that capacity cannot give rise to an action in damages *ex delicto* against municipal corporation which employs him.—*Id.*

A policeman employed by defendant city and assigned to special duty under city's Public Belt Railroad Commission, and whose salary may have been paid by revenue accruing to that department whether an employé of commission in a governmental function or an ordinary policeman, could not render city liable for damages *ex delicto* for his negligence.—*Id.*

City of New Orleans in operating a belt railroad, as required by Act No. 179 of 1908, § 3, subject to the right of board of commissioners of the Port of New Orleans to operate it on the city's failure, in acquiring, owning, and operating it, was engaged in a governmental function.—*Id.*

A municipal corporation maintaining open ditches and a wooden culvert, conducting drainage water to a point diagonally across the intersection of streets on which system of drainage was inadequate, was not liable for the death of an unattended child about four years old, who fell into the ditch and was drawn into the culvert and drowned, by reason of its failure to have a grating at the end of the culvert.—*Biegel v. City of New Orleans*, 1077.

An infant under four years cannot be blamed for negligence.—*Id.*

Municipal corporations cannot foresee or guard against all dangers incident to the rashness of children and are not insurers of the lives or safety of children.—*Id.*

Municipal authorities may presume that for every child under the age of discretion there is some one of matured judgment on whom rests the special duty and responsibility for the safety of the child.—*Id.*

Express company, whose leased premises included a platform, etc., and which furnished

another safe, convenient, and intended entrance and exit for its employes, was not liable to employe, injured from fall of stepladder nailed to end of platform, where there was no invitation to use it as an exit, and it was not furnished or placed by or with consent of company's officers or superior servants.—*Fischer v. Wells Fargo & Co. Express*, 1081.

Lessor was not responsible for injury to tenant's employe from falling of stepladder nailed to end of platform, where ladder was no part of leased premises, and was not thereon when leased, or thereafter placed there by lessor's officers or employes, or known to its officers.—*Id.*

One who is negligent cannot recover damages from a railroad for personal injury while walking on its track, where the railroad was not negligent in the operation of train causing injury.—*Vanon v. Louisiana Ry. & Nav. Co.*, 1085.

A judgment for \$1,000, in an action for a libel contained in judicial allegations, in view of plaintiff's extended business dealings and his high commercial and social position, and in view of Civ. Code, art. 1934, giving much discretion in assessment of damages to trial judge, was not an abuse of discretion.—*Sabine Tram Co. v. Jurgens*, 1092.

Where plaintiff employed an expert accountant to audit the books of a corporation and had his report disclosing facts pertaining to transactions on which charges of fraud against plaintiff, a stockholder and director, were judicially made in its petitions, there was no probable cause for plaintiff to believe such allegations true.—*Id.*

No one has a right or privilege to deem appropriate or pertinent to an issue presented for decision in a judicial proceeding a libelous allegation that he knows is false, or that he has no just or probable cause to believe is true.—*Id.*

False allegations in petitions, accusing plaintiff of certain acts of fraud as a stockholder and director of a corporation, were libelous.—*Id.*

## OFFER.

Of proof, see *Trial*, § 1

## OFFICERS.

Mandamus, see *Mandamus*, § 2.  
Receiving discriminatory rates from telegraph or telephone company, see *Telegraphs and Telephones*, § 1.

### *Particular classes of officers.*

See *Justices of the Peace*; *Receivers*; *Sheriffs* and *Constables*.

Municipal officers, see *Municipal Corporations*, § 2.

## § 1. Appointment, qualification, and tenure.

Under Const. arts. 71, 72, and 171, and Act 78 of 1906, General Assembly is as well within its rights in declaring that unexpired term of less than year of statutory office shall be filled by gubernatorial appointment as in declaring that unexpired term of more than year in such office shall be filled by election.—*Holstein v. Guss*, 6; *Guss v. Police Jury of Catahoula Parish, Id.*; *State ex rel. Holstein v. Guss, Id.*

Later commission to fill vacancy in office is inoperative when holder of earlier commission remaining in possession is not removed and indications are that later appointment was made in error of fact or law.—*Id.*

Const. art. 164, does not mean that citizen holding a state office, whom President under Const. U. S. art. 1, § 8, and Selective Service Act May 18, 1917, §§ 4, 6, has appointed member of a local draft board forfeits his office by acceptance of board duties.—*State v. Joseph*, 428.

Clerk of district court and ex officio jury commissioner does not vacate those positions by accepting an appointment as member of a local board provided for under Act Cong. May 18, 1917, known as the "Selective Service Act."—*Id.*

## OIL.

Oil land, see *Mines and Minerals*, § 1.

## OPINIONS.

Expression by district attorney as to opinion of guilt of accused, see *Criminal Law*, § 12.  
Of courts, see *Courts*, § 1.  
To purchase or sell demised premises, see *Landlord and Tenant*, § 1.

## ORDERS.

For appeal, see *Appeal*, §§ 4, 7.  
Review of appealable orders, see *Appeal*.

## ORDINANCES.

Municipal ordinances, see *Municipal Corporations*, §§ 1, 4.

## OVERDRAFTS.

See *Banks and Banking*, § 2.

## OWNERSHIP.

The ownership of the surface of the earth carries with it the right to the minerals beneath and the consequent privilege of mining and extracting them.—*De Moss v. Sample*, 243.

In view of Civ. Code, arts. 484, 505, the elements of ownership in land may be severed and the owner may sell surface rights and except from the sale the minerals below the surface, whether they are in place, like coal, etc., or are migratory, like oil and gas.—1d.

As used in Civ. Code, art. 3451, defining a "possessor in good faith" as one who has just reason to believe he is the owner of the property he possesses, although he may not be in fact, the term "just reason to believe" does not mean having a reason supported by law.—*Delouche v. Rosenthal*, 581.

## PARAPHERNAL PROPERTY.

See Husband and Wife, §§ 1, 3.

## PARENT AND CHILD.

See Minors.

Certiorari to review order for support of child, see Certiorari, § 1.

Cruel and unusual punishment in prosecution for failure to support child, see Criminal Law, § 15.

Injuries to children on streets, see Municipal Corporations, § 5.

Prohibition against proceedings to compel giving bond for support of child, see Prohibition, § 1.

An order to pay alimony for the support of defendant's minor child was not a sentence, and no appeal would lie until a sentence of fine or imprisonment, or both, had been imposed.—*State v. Clark*, 481.

Where a parent was convicted of failing to support his minor child, and ordered to pay a certain amount per month for its support, the juvenile court's order that a guaranty bond be furnished by defendant did not exceed its authority.—*State v. Clark*, 481.

## PARISHES.

Highway taxes, see Highways, § 1.

## PAROL EVIDENCE.

See Frauds, Statute of, § 1.

In civil action, see Evidence, § 2.

## PARTICULARS.

Bill of, see Indictment and Information, § 1.

## PARTIES.

Dismissal for defects, see Dismissal and Non-suit, § 1.

In action to annul mortgage, see Mortgages, § 2.

In action to recover earnest money deposited with brokers, see Brokers, § 1.  
Probate proceedings, see Wills, § 2.

## § 1. Defects, objections, and amendment.

An exception to the capacity of a plaintiff to sue and stand in judgment must be filed in limine.—*Koepping v. Monteleone*, 353.

## PARTITION.

Application for in connection with proceedings for interpretation of will, see Wills, § 2.

Remand of case on appeal, see Appeal, § 10.  
Right of defendants to call their vendors in warranty, see Covenants, § 1.

## § 1. Actions for partition.

Where Supreme Court did not consider merits of issues raised or attempted to be presented by plea of estoppel filed therein, its refusal to consider plea would not prevent defendant's request for a collation by way of opposition to homologation of partition proceedings.—*Tyler v. Lewis*, 229.

Where a succession is under administration, and there are major and minor heirs and creditors, a demand by one of the major heirs, opposed by the others and by the minors, for a partition, is properly dismissed as premature.—*Succession of Manion*, 799.

## PARTNERSHIP.

### § 1. Rights and liabilities as to third persons.

Servant of partnership injured as result of employment cannot maintain action against member of partnership alone, either for damages for employer's neglect to perform a duty of furnishing safe place and tools required by Civ. Code, art. 2315, or for compensation under Employers' Liability Act, Act No. 20, of 1914, for disability on allegation that individual defendant was the employer.—*Dupre v. Coleman*, 69.

Code Prac. art. 198, applies to ordinary partnerships, as well as commercial partnerships, so that service of citation, as therein prescribed, "on any of the partners in person, or, at their store or counting house by delivery to their clerk or agent," is sufficient to support judgment against an ordinary partnership.—*Victor Cornille & De Bloude v. R. G. Dun & Co.*, 1045.

## PASSENGERS.

See Carriers, § 2.

## PASSES.

See Carriers, § 1.

Forfeiture of sheriff's office for wrongfully receiving, see Sheriffs and Constables, § 1.

**PAYING.**

Streets in cities, see Municipal Corporations, § 3.

**PAYMENT.**

Parol or extrinsic evidence, see Evidence, § 2.

**PEDDLERS.**

See Hawkers and Peddlers.

**PENALTIES.**

Imposition on person opposing tax, see Taxation, § 6.  
Under contracts, see Damages, § 2.

**PERSONAL INJURIES.**

Sheriff's liability for act of deputy, see Sheriffs and Constables, §§ 2, 3.

*Particular causes or means of injury.*

See Negligence.

Defects in demised premises, see Landlord and Tenant, § 2.

Operation of railroads, see Railroads, § 3.

Operation of street railroad, see Street Railroads, § 1.

*Particular classes of persons injured.*

Employés, see Master and Servant, §§ 1, 3.

Passengers, see Carriers, § 2.

Traveler on highway, see Municipal Corporations, § 6.

Traveler on highway crossing railroad, see Railroads, § 3.

*Remedies.*

See Damages.

**PETITION.**

In pleading, see Pleading, § 2.

**PETITORY ACTION.**

Estoppel to impugn title, see Estoppel, § 1.

Prescription of, see Prescription, § 1.

Presumptions and review on appeal, see Appeal, § 9.

In petitory action, burden of proof is on plaintiff, and he can recover only on strength of his own title, and not on weakness of adversary's.—*Russell v. Producers' Oil Co.*, 217.

In a petitory suit by one whose interest in land had been sold by his mother as his natural tutrix during his minority, a possessor in good faith was properly permitted to retain possession until improvements were paid for.—*Delouche v. Rosenthal*, 581.

In a petitory suit for a fourth interest in land in defendant's possession which had been adjudicated to plaintiff's mother for a debt of the succession, and by her conveyed to defendant, plaintiff could not be condemned to reimburse defendant for such debt.—*Id.*

In a petitory suit by one whose interest in land had been sold by his mother as his natural tutrix during his minority, a possessor in good faith was properly adjudged to pay rents and revenues only from date of judicial demand.—*Id.*

Where citation in ejectment proceedings summoned defendant in name of state of Louisiana and of First judicial district court of parish of Caddo, exception on ground citation had not been issued in name of state, in accordance with Code Prac. art. 774, and Const. art. 90, was properly overruled; citation complying with Code Prac. art. 179.—*Herndon v. Wakefield-Moore Realty Co.*, 724; *Wakefield-Moore Realty Co. v. Herndon*, *Id.*

In ejectment by plaintiffs, whose heirs had been judicially decreed the land in question, and whose title was complete, if there had been no transfer, defendant, asserting title by transfer from plaintiffs' authors or ancestors in title, was obliged to prove transfer.—*Roussel v. New Orleans Land Co.*, 1058.

**PHYSICIANS AND SURGEONS.**

Employer's liability for mistake or malpractice of physician employed to treat employé, see Master and Servant, § 3.  
Presumptions as to employment, see Evidence, § 1.

Where services of physician and surgeon were of the highest value, in so far as patient's life and welfare were concerned, and his charge was neither unreasonable nor inconsiderate, as compared with employer's financial ability, on which basis such charge is commonly fixed, it should be allowed.—*Succession of Levitan*, 1025.

**PIPE LINES.**

See Gas.

**PLATS.**

Dedication of property by, see Dedication, § 1.

**PLEA.**

In civil actions, see Pleading, § 3.

Of autrefois acquit, see Criminal Law, § 9.

**PLEADING.**

Indictment or criminal information or complaint, see Indictment and Information.

Libelous allegations, see Libel and Slander, § 1.

Objections for purpose of review, see Appeal, § 3.

*In actions by or against particular classes of persons.*

See Master and Servant, § 3; Railroads, § 3.

*In particular actions or proceedings.*

See Divorce and Separation from Bed and Board, § 2.

For causing death, see Death, § 1.

For injuries caused by operation of railroad, see Railroads, § 3.

For injuries to servant, see Master and Servant, § 3.

For slander of title, see Libel and Slander, § 4.

For wrongful sequestration, see Sequestration. On sheriff's bond, see Sheriffs and Constables, § 3.

On suretyship obligation, see Suretyship, § 2.

To recover price paid for land, see Sales, § 10.

To restrain mortgage foreclosure, see Mortgages, § 2.

To set aside fraudulent conveyances, see Fraudulent Conveyances, § 1.

### § 1. Form and allegations in general.

Pleadings are construed strictly against pleader.—*Arthur v. Alexandria Lumber Co.*, 207.

In widow's suit for husband's death in service, allegation that husband had right to be in building where he was killed was mere conclusion of law, which cannot be made to serve for allegation of necessary fact.—*Id.*

Petition may be composed in part of documents, alleged to be made part of it, whose recitals are considered to be made in the petition, if documents are actually made a part of the petition, which is not accomplished by mere reference.—*Tremont Lumber Co. v. May*, 389; *Louisiana Central Lumber Co. v. Same*, 420; *Davis Bros. Lumber Co. v. Same*, *Id.*

In railroad's action against terminal company for damages through collision of trains, petition's allegation that collision was due entirely to action of defendant's employes was equivalent to allegation it was not by orders of train dispatcher, joint employe of parties, that guilty train was on wrong track.—*Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 467; *In re New Orleans Terminal Co.*, *Id.*

As against exception of no cause of action, petition must be construed most strongly against pleader.—*Id.*

Under Code Prac. art. 172, requiring plaintiff only to allege cause of action, in contest of primary because nonresidents were allowed to vote, testimony of bystanders, who had seen ballots and could testify as to contents, was not inadmissible because of absence of allegation of fraud in conduct of election, or of the ballot boxes not having been safely kept, etc.—*Gaiennie v. Druilhet*, 662; *In re Gaiennie*, *Id.*

Allegation in purchaser's petition to recover payments that "defendant was unable to give title" was not a well-pleaded allegation of fact, because showing no more than the pleader's opinion, and would not necessarily be taken as true on an exception of no cause of action.—*Cousin v. Schmidt*, 843; *In re Schmidt*, *Id.*

Where a creditor charges that a debtor entered into fraudulent real or fraudulent sham contracts, it knows not which, and prays that they be declared void, the creditor is not debarred on the ground of inconsistency from demanding that the contracts, if sham, be decreed void.—*Hibernia Bank & Trust Co. v. Louisiana Ave. Realty Co.*, 962; *Interstate Trust & Banking Co. v. Same*, 971.

### § 2. Petition.

Petition may disclose cause of action though allegations in some respects are not sufficiently full or specific to furnish defendant with information to which he is entitled.—*Tremont Lumber Co. v. May*, 389; *Louisiana Central Lumber Co. v. Same*, 420; *Davis Bros. Lumber Co. v. Same*, *Id.*

### § 3. Plea or answer, cross-complaint, and affidavit of defense.

Although it would have been expeditious to have referred the plea of prescription to merits of case, or to have tried it with merits, it was not an error to refuse to consider the plea as an answer to the suit.—*Generes v. Bowie Lumber Co.*, 811.

### § 4. Exception.

Where suit of tax debtor contesting action of board of review in raising assessment is instituted and proper parties cited before November 1st of year of assessment, and exception of no cause of action is overruled, fact that by order of court petition is afterwards amended to cure vagueness affords no ground for maintaining exception of prescription.—*Tremont Lumber Co. v. May*, 389; *Louisiana Central Lumber Co. v. Same*, 420; *Davis Bros. Lumber Co. v. Same*, *Id.*

Exception to petition of no cause of action must be determined from facts alleged.—*Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 467; *In re New Orleans Terminal Co.*, *Id.*

### § 5. Amended and supplemental pleadings and replender.

Where, in maintaining exception of vagueness of allegation, trial court orders plaintiff to amend petition, plaintiff does not require permission to file petition complying with order.—*Tremont Lumber Co. v. May*, 389; *Louisiana Central Lumber Co. v. Same*, 420; *Davis Bros. Lumber Co. v. Same*, *Id.*

Where document alleged to be made part of petition is not in fact annexed and filed, although court is of opinion that it discloses no cause of action, it may at any time before exception allow plaintiff to amend.—*Id.*

Petition which does not show cause of action cannot be amended.—*Id.*

Where cause of action is stated for first time in supplemental petition, filing of supplemental petition must be considered beginning of suit, and must be served on defendant and delays for answering allowed as in case of original petition.—*Id.*

#### § 6. Profert, oyer, and exhibits.

Where document alleged to be made part of petition is not in fact annexed and filed, court will determine, from allegations of petition itself, whether it discloses no cause of action.—*Tremont Lumber Co. v. May*, 389; *Louisiana Central Lumber Co. v. Same*, 420; *Davis Bros. Lumber Co. v. Same*, *Id.*

#### § 7. Motions.

Even if a creditor's allegations in an action against an alleged fraudulent debtor are inconsistent, the defendant's recourse is by compelling plaintiff to elect and to dismiss his whole demand only in case of failure to elect.—*Hibernia Bank & Trust Co. v. Louisiana Ave. Realty Co.*, 962; *Interstate Trust & Banking Co. v. Same*, 971.

### POLICE.

Liability of city for acts of, see *Municipal Corporations*, § 6.

### POLICE JURY.

Levy of highway taxes, see *Highways*, § 1.  
Necessity of filing bond on appeal, see *Appeal*, § 4.

### POLICE POWER.

Of municipality, see *Municipal Corporations*, § 4.

### POLICY.

Of insurance, see *Insurance*.

### POLITICAL RIGHTS.

Suffrage, see *Elections*.

### POSSESSION.

Acquisition of prescriptive rights, see *Prescription*, § 4.  
Of property involved in petitory action, see *Petitory Action*.

### POSSESSORY ACTION.

See *Petitory Action*.

### POST OFFICE.

Presumption as to regularity of course of mail, see *Evidence*, § 1.

### PRACTICE.

In land office, see *Public Lands*, § 1.

Procedure of particular courts, see *Courts*.

*In particular civil actions or proceedings.*

See *Divorce and Separation from Bed and Board*, § 2; *Petitory Action*; *Prohibition*.

*Particular proceedings in actions.*

See *Affidavits*; *Costs*; *Damages*, § 4; *Dismissal and Nonsuit*; *Evidence*; *Execution*; *Judgment*; *Judicial Sales*; *Jury*; *Prescription*; *Parties*; *Pleading*; *Process*; *Trial*; *Venue*.

*Particular remedies in or incident to actions.*

See *Injunction*; *Receivers*; *Sequestration*.

*Procedure in criminal prosecutions.*

See *Bail*, § 1; *Criminal Law*.

*Procedure on review.*

See *Appeal*; *Certiorari*, § 2; *Justices of the Peace*, § 1; *New Trial*.

### PRAYER.

Right of accused to object to opening of court with prayer, see *Criminal Law*, § 14.

### PREJUDICE.

Ground for reversal in criminal prosecutions, see *Criminal Law*, § 14.

### PRELIMINARY INJUNCTION.

See *Injunction*, § 3.

### PREMATURITY.

Of demand for partition, see *Partition*, § 1.

### PRESCRIPTION.

Of action by claimant under tax sale, see *Taxation*, § 9.

Of probate proceedings, see *Wills*, § 2.

Of proceeding for recovery under *Employers' Liability Act*, see *Master and Servant*, § 5.

Of right to accept or renounce succession, see *Succession*, § 2.

Of suit to set aside fraudulent conveyances, see *Fraudulent Conveyances*, § 1.

Rights between co-owners, see *Tenancy in Common*, § 1.

**§ 1. Statutes of prescription — Nature, validity, and construction in general.**

Statutes of repose, by which titles are confirmed, are enacted for the benefit of those only who have primordial or voidable title, and not for benefit of trespassers or possessors without even a voidable title.—*Generes v. Bowie Lumber Co.*, 811.

The prescription of 30 years referred to in Civ. Code, art. 3548, does not defeat a petitory action by an owner against a trespasser or possessor without as much as a voidable title and without 30 years' possession.—*Id.*

**§ 2. — Prescription applicable to particular actions.**

Corporation's action against manager to recover amount of his personal debts, paid by him with its funds, without authority, is subject, not to prescription applicable to original debts so paid, but to that of ten years under Rev. Civ. Code, art. 3544.—*Bryceland Lumber Co. v. Kerlin*, 242.

Where terminal company obligated by contract with railroad company to provide for safe movements of trains, through its employes ran train into train of railroad company, it was liable for breach of contract though its act was a tort, and limitations of one year relating to torts were not applicable, where action was grounded on contract.—*Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 467; *In re New Orleans Terminal Co.*, *Id.*

**§ 3. Computation of period of prescription.**

The prescription of 30 years referred to in Civ. Code, arts. 1305, 3499, and 3548, is suspended during the minority of a person against whom it might otherwise operate.—*Tyler v. Lewis*, 229.

Under Civ. Code, art. 3541, and Act No. 148 of 1898, § 1, being a fugitive from justice does not suspend prescription as to claims of persons residing in other states against the fugitive from this state.—*Koepping v. Monteleone*, 353.

The prescription against the debt of a succession for which the property was sold to the creditor was interrupted or suspended while the creditor held possession of the property in satisfaction of the debt.—*Delouche v. Rosenthal*, 581.

**§ 4. Of immovables—Nature and requisites.**

Under Civ. Code, arts. 3442-3444, 3500-3502, ownership of immovables is prescribed for by 30 years' continuous, public, and unequivocal possession under claim of title without need of title or possession in good faith, which, if not interrupted, may be preserved by vestiges of works erected by possessor or by continued intentions to possess.—*Croom v. Noel*, 189.

An ex parte order or judgment sending heirs or legatees into possession of an estate, is not, and does not purport to be, a transfer of title, and cannot serve as a basis for the prescription of 10 years *acquirendi causa*.—*Tyler v. Lewis*, 229.

Testamentary disposition to a class, not on its face a transfer of title to any particular member of class, cannot serve as basis for prescription for 10 years *acquirendi causa*, pleaded by one or some of members against another member of class.—*Id.*

Prescription *acquirendi causa* does not run against the state for its own property.—*State v. New Orleans Land Co.*, 858.

Prescription *acquirendi causa* does not run against the state for school land, conditional title to which was given the state by Act Cong. Feb. 15, 1843.—*Id.*

Successive titularies of land, confident in the security of their title for more than 150 years, should not be disturbed unless the legal situation compels it.—*Id.*

Under prescription *liberandi causa*, Civ. Code art. 3548, construed with articles 3457, 3499, et seq., and article 496, an owner, not manifesting his ownership within 30 years, does not lose his ownership, or his right of action to recover property from one who has taken possession within a less time than 30 years.—*Harang v. Golden Ranch Land & Drainage Co.*, 962.

## PRESUMPTIONS.

As to validity of action by railroad commission, see *Carriers*, § 1.

In civil actions in general, see *Evidence*, § 1.

On appeal or writ of error in civil actions, see *Appeal*, § 9.

## PRINCIPAL AND AGENT.

See *Mandate*.

## PRINCIPAL AND SURETY.

See *Suretyship*.

## PRIVATE NUISANCE.

See *Nuisance*, § 1.

## PRIVILEGE.

See *Mechanics' Privileges*.

For wages, see *Master and Servant*, § 2.

Vendor's privilege on goods sold, see *Sales*, § 3.

## PROBATE.

Of will, see *Wills*, § 2.

## PROCESS.

In ejectment, see *Petitory Action*.  
Service on partnership, see *Partnership*, § 1.

*Particular forms of writs or other process.*

See *Execution*; *Injunction*; *Mandamus*; *Prohibition*; *Sequestration*.

### § 1. Nature, issuance, requisites, and validity.

Citation is not "process" within the meaning of Const. art. 90, providing that "the style of all process shall be 'the state of Louisiana.'"—*Herndon v. Wakefield-Moore Realty Co.*, 724; *Wakefield-Moore Realty Co. v. Herndon*, Id.

## PROHIBITION.

Of traffic in intoxicating liquors, see *Intoxicating Liquors*.

Supervisory jurisdiction of supreme court, see *Courts*, § 2.

### § 1. Nature and grounds.

A writ of prohibition will not issue to judge of juvenile court, where defendant was ordered to pay alimony to his child, to furnish a guaranty, or conditional bond, and in default in furnishing such bond to be held for further orders of the court.—*State v. Clark*, 481.

Relator should have exhausted his remedies for relief in trial court before obtaining prohibition against judge of juvenile court, ordering him to give a guaranty bond to pay monthly sum for support of relator's child, and in default of bond to be held for further orders of the court, etc.—Id.

### § 2. Jurisdiction, proceedings, and relief.

The informality of applying for a writ of prohibition directly in the name of the applicant, instead of in the name of the state, is not fatal, where the petition otherwise discloses a right to the writ.—*Davenport v. Sterling Lumber Co.*, 671; *In re Davenport*, Id.

## PROMISSORY NOTES.

See *Bills and Notes*.

## PROPERTY.

See *Mines and Minerals*.

Constitutional guaranties of rights of property, see *Constitutional Law*, § 2.

Dedication to public use, see *Dedication*.

Escheat, see *Escheat*.

Prescriptive rights, see *Prescription*, § 4.

As used in Civ. Code, art. 3451, defining a "possessor in good faith" as one who has just reason to believe he is the owner of the prop-

erty he possesses, although he may not be in fact, the term "just reason to believe" does not mean having a reason supported by law.—*Delouche v. Rosenthal*, 581.

## PROSTITUTION.

See *Disorderly House*.

Ordinances relating to operation of houses for purpose of as affecting vested rights, see *Constitutional Law*, § 2; as denial of equal protection of law, see *Constitutional Law*, § 5; as impairing obligation of contract, see *Constitutional Law*, § 3; partial invalidity, see *Municipal Corporations*, § 1.

## PROXIMATE CAUSE.

Direct or remote consequences of injury, see *Damages*, § 1.

Escaping gas as cause of injuries, see *Gas*.

Negligent operation of automobile on streets as cause of injuries, see *Municipal Corporations*, § 5.

## PUBLIC DEBT.

See *Municipal Corporations*, § 7.

## PUBLIC IMPROVEMENTS.

By municipalities, see *Municipal Corporations*, § 3.

## PUBLIC LANDS.

Land held in trust for schools, see *Schools and School Districts*, § 1.

Prescription against state for school land, see *Prescription*, § 4.

### § 1. Survey and disposal of lands of United States.

A purchaser from commissioners of Atchafalaya Basin levee district of land donated to it by Act No. 97 of 1890 may protect his title by staying a sale of land by register of the land office under supposed authority of Act No. 215 of 1908, though act of conveyance from state to board may not have been executed.—*Atchafalaya Land Co. v. Grace*, 637.

Land not awarded as school land by the Land Department did not belong to the state and was not subject to be alienated by it, by direct deed or through the medium of an estoppel.—*State v. New Orleans Land Co.*, 858.

A private asylum for destitute girls could not transfer land of the state or of the public schools to board of commissioners of a drainage district, created by Act No. 185 of 1858, in payment of any debt it might owe, though the debt was due in part for drainage of the land.—Id.



As between state and schools, title to fractional section of land, for all purposes of suit by state against claimant of land, must be held to be in schools; Land Department having so adjudicated title, and state not having appealed.—Id.

### § 2. Disposal of lands of the state.

Rule that unrecorded sale of realty does not bind third parties applies as well to a receiver's certificate not recorded in land office, and on which no patent was issued, as to a sale by an individual not recorded in parish where land is situated.—*Chalmers v. Frost-Johnson Lumber Co.*, 836.

### § 3. Colonial and proprietary grants.

The acts of Congress providing for the confirmation and registry of colonial land grants refer only to inchoate titles, not to those which had matured before transfer of the colony to the United States.—*State v. New Orleans Land Co.*, 858.

### § 4. Spanish grants.

Actual occupancy, for more than 30 years during Spanish régime, of land now within limits of New Orleans, then within mile of limits, brought to public attention by two notarial transfers at time, may be considered to have had the tacit, if not the express confirmation of the Spanish régime.—*State v. New Orleans Land Co.*, 858.

## PUBLIC POLICY.

Affecting validity of contract, see Contracts, § 1.

Discriminatory rates by telegraph or telephone company, see Telegraphs and Telephones, § 1.

## PUBLIC PROPERTY.

Exemption from taxation, see Taxation, § 2.

## PUBLIC SCHOOLS.

See Schools and School Districts, § 1.

## PUBLIC SERVICE COMMISSIONS.

Mandamus to control acts of, see Mandamus, § 2.

Regulation of carriers, see Carriers, § 1.

Regulation of railroads, see Railroads, § 1.

Supervisory jurisdiction of supreme court, see Courts, § 2.

State courts have no original jurisdiction in matters reposed by Const. arts. 283, 284, 286, in Railroad Commission, but under article 285 they may review decision of commission, where the commission has taken steps in the premises.—*State ex rel. Tate v. Brooks-Scanlon Co.*, 539; *In re Brooks-Scanlon Co.*, Id.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

Denial of equal protection of laws, see Constitutional Law, § 5.

Gas companies, see Gas.

Subject and title of act relating to actions for personal injuries, see Statutes, § 1.

## PUBLIC USE.

Dedication of property, see Dedication.

## PUNISHMENT.

See Criminal Law, §§ 14, 15.

## RAILINGS.

On bridges in cities, see Municipal Corporations, § 6.

## RAILROAD COMMISSION.

See Carriers, § 1; Public Service Commissions; Railroads, § 1.

Mandamus to control acts of, see Mandamus, § 2.

Supervisory jurisdiction of supreme court, see Courts, § 2.

## RAILROADS.

See Street Railroads.

As employers, see Master and Servant.

Carriage of goods and passengers, see Carriers.

Operation of belt railroad by city, see Municipal Corporations, § 6.

Prescription of action for breach of contract, see Prescription, § 2.

Taxation of, see Taxation, § 1.

### § 1. Control and regulation in general.

Although, under Const. art. 285, an appeal from judgment upholding order of Railroad Commission is returnable within 10 days after decision of district court, yet, if judge erroneously allows more than 10 days in order fixing return day, appellant should not suffer dismissal.—*Alexandria & W. Ry. Co. v. Railroad Commission of Louisiana*, 1067.

### § 2. Sales, leases, traffic contracts, and consolidation.

Contract between railroad company and terminal company, whereby terminal company undertook to provide for movement of trains, obligated terminal company to provide for their safe movement.—*Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 467; *In re New Orleans Terminal Co.*, Id.

Terminal company, which, by contract with railroad company, reserved exclusively to itself function to provide for safe movement of trains, assumed exclusive responsibility for nondischarge of such function.—*Id.*

Clause of contract between railroad company and terminal company, obligating terminal company to make good any losses occasioned entirely through fault of its own employees, *held* to offend neither prohibitory law nor good morals, and to prevent absorption of breach of contract in tort.—*Id.*

### § 3. Operation.

In action by widow of one killed while lying between rails of track, evidence *held* not to show want of exercise of ordinary care on part of defendant's engineer after dangerous position of deceased was or should have been discovered by him.—*Rogers v. Louisiana Ry. & Nav. Co.*, 58.

In action for damages for death of plaintiff's husband alleged to have been killed by the reckless, wanton, and negligent act of defendant railroad, evidence *held* not to show that death was caused by defendant's negligence.—*Granger v. Illinois Cent. Ry. Co.*, 168.

Where one recklessly lies down on a railroad track and at such a time and place that in the exercise of ordinary care an engineer could not discern his presence in time to avoid striking him, his widow and heirs cannot recover from railroad.—*Tyer v. Gulf, C. & S. F. Ry. Co.*, 177.

In action for damages for death of plaintiffs' son who was run over by defendant's train while he was asleep beside the track, evidence *held* not to show that engineer was negligent in failing to see deceased in time to avoid accident.—*Hyde v. Texas & P. Ry. Co.*, 185.

Engineer's failure to blow whistle when he saw boy asleep beside the track, if error of judgment, would not be considered negligence in such emergency.—*Id.*

Where it was impossible for the engineer of the train which struck plaintiff to have seen the danger in time to have avoided the accident, the doctrine of last clear chance had no application.—*Lowe v. Kansas City Southern Ry. Co.*, 281.

Plaintiff injured by incoming train after alighting from standing train, which he had boarded to talk to passenger, and who knew the conditions and had been warned of danger, *held* guilty of contributory negligence defeating a recovery.—*Id.*

In action against railroad for injuries at crossing, burden of pleading contributory negligence is on railroad, not on injured person.—*Maher v. Louisiana Ry. & Nav. Co.*, 386.

In action against railroad for injuries at crossing, petition should show absence of design on part of injured person to bring about accident, which is done by allegation he was in no wise at fault.—*Id.*

One run down by railroad train on street crossing is not necessarily at fault, but only so if he contributed to event by his negligence.—*Id.*

In an action for personal injury when defendant's railroad motorcar struck the buggy in which plaintiff was riding and injured him, evidence *held* not to show that defendant flagman had given warning in time to prevent the accident.—*Lincks v. Illinois Cent. R. Co.*, 445.

Where a railroad continuously kept a flagman at a crossing where the view of passing trains was obstructed, one who was familiar with such conditions might rely on the flagman's warning.—*Id.*

Where plantation owner contracted for private spur track between two regular shipping stations, each less than two miles away from the spur, spur being accessible to public only by private road, railroad could not be required to maintain spur at own expense, on ground of increase of traffic.—*Louisiana Ry. & Nav. Co. v. Railroad Commission of Louisiana*, 660.

One who is negligent cannot recover damages from a railroad for personal injury while walking on its track, where the railroad was not negligent in the operation of train causing injury.—*Vanon v. Louisiana Ry. & Nav. Co.*, 1085.

## REAL ACTIONS.

See Petitory Action.

## REAL ESTATE AGENTS.

See Brokers.

## RECEIPTS.

Parol or extrinsic evidence, see Evidence, § 2.

## RECEIVERS.

See Public Lands, § 2.

Conflicting jurisdiction of courts, see Courts, § 3.

Necessity of filing bond on appeal, see Appeal, § 4.

Suspension of proceedings on appeal on opposition to receiver's account, see Appeal, § 8.

### § 1. Management and disposition of property.

Adjudication at receiver's sale in suit against a city could transfer only such title to the land as the city had.—*State v. New Orleans Land Co.*, 858.

## RECEPTION OF EVIDENCE.

See Trial, § 1.

## RECITALS.

In bill of exceptions in criminal prosecution, see Criminal Law, § 14.

**RECORDS.**

Matters, of record as affecting good faith of purchaser of land, see Sales, § 8.  
Of receiver's certificate, see Public Lands, § 2.  
Transcript on appeal, see Appeal, § 6; Criminal Law, § 14.

**REDEMPTION.**

From tax sales, see Taxation, § 8.

**REFORMATION OF INSTRUMENTS.**

See Cancellation of Instruments.

**§ 1. Right of action and defenses.**

Equity may reform an act or sale so as to make it conform to the true intention of the parties.—Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co., 743.

Where mining company authorized president to sell right of way to canal company, but land itself was sold, in absence of proof that canal company sought a less interest, which could be furnished only by resolution of board of directors authorizing purchase, mining company cannot have reformation.—Id.

**REHEARING.**

See New Trial.

**REIMBURSEMENT.**

Incidental to petitory action, see Petitory Action.

**RELEASE.**

Of mortgage, see Mortgages, § 1.  
Of surety on appearance bond, see Bail, § 1.

**RENEWAL.**

Of lease, see Landlord and Tenant, § 1.

**RENT.**

See Landlord and Tenant, § 3.  
Of property involved in petitory action, see Petitory Action.

**REOPENING CASE.**

Proceedings for compensation under Employers' Liability Act, see Master and Servant, § 5.

**REPEAL.**

Of statute, see Statutes, § 2.  
Of statute relating to mechanic's privilege, see Mechanics' Privileges, § 1.

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**RESCISSION.**

Cancellation of written instrument, see Cancellation of Instruments.  
Of contract for sale of land, see Sales, § 6.

**RESERVATIONS.**

In acts of sale, see Sales, § 11.

**RESIDENCE.**

See Domicile.

**RES JUDICATA.**

See Judgment, § 5.

**RESTRICTIONS.**

In wills, see Wills, § 3.

**RETROSPECTIVE LAWS.**

Constitutional restrictions, see Constitutional Law, § 4.

**RETURN.**

By taxpayer, see Taxation, § 4.

**REVENUE.**

See Taxation.

**REVIEW.**

See Appeal; Certiorari; Criminal Law, § 14; Justices of the Peace, § 1.

**REVOCATORY ACTION.**

See Fraudulent Conveyances, § 1.

**ROADS.**

See Highways.  
Streets in cities, see Municipal Corporations, §§ 5, 6.

**SALES.**

Acts of sale of mineral rights, see Mines and Minerals, § 1.  
Covenants in sales of realty, see Covenants.  
Estoppel by act of sale, see Estoppel, § 1.  
In fraud of creditors, see Fraudulent Conveyances.  
Of demised premises as preventing renewal of lease, see Landlord and Tenant, § 1.  
Parol or extrinsic evidence, see Evidence, § 2.

Presumptions as to validity of contract, see Evidence, § 1.

Privilege of contractor erecting building subject to vendor's privilege, see Mechanics' Privileges, § 2.

Reformation of, see Reformation of Instruments, § 1.

Requirements of statute of frauds, see Frauds, Statute of, § 1.

*Sales by or to particular classes of persons.*

See Hawkers and Peddlers; Receivers' Sales, § 1.

*Sales of particular species of, or estates or interests in, property.*

See Bills and Notes, § 1; Intoxicating Liquors. Community property, see Husband and Wife, § 5.

State land, see State, § 1.

*Sales on judicial or other proceedings.*

See Judicial Sales.

Mortgage foreclosure, sale, see Mortgages, § 2.

Of property of minors, see Minors, § 2.

On execution, see Execution, § 1.

Tax sales, see Taxation, §§ 6-9.

### § 1. Of movables — Requisites and validity of contract.

In view of Civ. Code, art. 2458, an agreement to sell 300 head of cattle at a fixed price per pound was not void for uncertainty as to the weight of the cattle.—*Northcut v. Johnson*, 447.

In view of Civ. Code, art. 2458, an agreement to sell 300 head of cattle, or as near that number as could be rounded up and delivered in the time specified, was not void for uncertainty as to number of cattle, notwithstanding purchaser's agreement to accept whatever number was delivered.—*Id.*

### § 2. — Performance of contract.

Where contract was for sale of sugar to be weighed and sampled at arrival, act of buyer's superintendent in suggesting that barge be moved to the ship's side, without assuming responsibility for its safety, was not an acceptance of delivery dispensing with weighing and sampling.—*Milliken & Farwell v. American Sugar Refining Co.*, 667.

### § 3. — Remedies of seller.

Railroad iron used in construction of plantation railway under contract with owner loses its character as a movable and its identity for purpose of vendor's privilege, as it enters into a new and distinct thing, a construction which is immovable within Civ. Code, arts. 462-464.—*Morgan's Louisiana & T. R. & S. S. Co. v. Himalaya Planting & Mfg. Co.*, 460.

### § 4. Of immovables — Requisites and validity of contract.

A contract whereby owner agrees to sell property and other party to buy it for a certain

price within certain time, the purchaser depositing a sum as part purchase price, is not a complete "sale," but only an "agreement for sale" with a payment of earnest money.—*Maloney v. Aschaffenburg*, 509.

Realty is susceptible of sale while under attachment, though it cannot be delivered, except by the fictive delivery, which accompanies the authentic act, since, under Rev. Civ. Code, art. 2458, a sale, as between the parties, is perfect without delivery.—*Herndon v. Wakefield-Moore Realty Co.*, 724; *Wakefield-Moore Realty Co. v. Herndon*, *Id.*

If persons desiring to buy a plantation deceived the selling company, the deception bearing on a material part of the promise of sale, the company could nullify the contract, but a stranger to the contract could not.—*Id.*

### § 5. — Construction and operation of contract.

A promise of sale of real estate duly evidenced by writing and recorded is equivalent to a sale.—*Herndon v. Wakefield-Moore Realty Co.*, 724; *Wakefield-Moore Realty Co. v. Herndon*, *Id.*

### § 6. — Modification or rescission of contract.

On breach of vendor's contract to furnish a good and sufficient warranty title, buyer may maintain an action to rescind the contract and to recover the money paid thereunder; the contention that the contract itself is a sufficient title being no defense.—*Talbot v. New Orleans Land Co.*, 263; *In re New Orleans Land Co.*, *Id.*

Where the parties have contracted for a sale of land with "good and sufficient warranty title" doctrine that buyer in possession cannot rescind for alleged defect in title conveyed to him, save in case of eviction does not apply; nor does Civ. Code, art. 2462, apply.—*Id.*

### § 7. — Performance of contract.

A contract whereby owner is to make "a good and sufficient warranty title" on certain conditions, after compliance with such conditions, is breached by the tender of a title incumbered by an inscription showing pending litigation.—*Talbot v. New Orleans Land Co.*, 263; *In re New Orleans Land Co.*, *Id.*

A vendor's obligation to furnish "a good and sufficient warranty title" means a title which is not involved in and threatened with litigation, and if unable to comply therewith vendor is in the same position as a vendor unable to protect possession of purchaser.—*Id.*

### § 8. — Rights and liabilities of parties.

Under Rev. Civ. Code, art. 3452, defining a "possessor in bad faith," bad faith is not to be imputed to a purchaser merely because an examination of the records would have disclosed a defect in the vendor's title.—*Delouche v. Rosenthal*, 581.

Under Rev. Civ. Code, art. 2266, contract for sale of a plantation was null and void for want of recordation as against third persons, and could not serve as the basis of suit by the vendee against them; they having purchased subsequently to the contract.—*Herndon v. Wakefield-Moore Realty Co.*, 724; *Wakefield-Moore Realty Co. v. Herndon*, Id.

Where an unrecorded contract for sale of plantation was void as against subsequent purchasers, such purchasers cannot be said to have perpetrated a fraud on the first vendee by misrepresenting his financial standing to the vendor, inducing it to break its contract, thus treating the contract as void.—Id.

### § 9. — Remedies of vendor.

Separate appraisal contemplated by Civ. Code, art. 3268, where proceeding by vendor of immovables to enforce payment of price is opposed by workmen who erected building on land for purchaser, need not, in all cases, be made before sale.—*New Orleans Land Co. v. Southern States Fair-Pan-American Exposition Co.*, 884.

### § 10. — Remedies of purchaser.

Petition, alleging an agreement to buy land from defendants, payment on account of price, and demanding repetition of amounts paid, subject to credits, disclosed no cause of action, in view of Civ. Code, arts. 1911, 1933, not alleging that deed was to be executed within an agreed time, demand by purchaser and default by vendor.—*Cousin v. Schmidt*, 843; *In re Schmidt*, Id.

### § 11. — Acts of sale.

An "exception" is of something that is part of the thing granted existing at the time of the grant, as coal or oil in the land, and upon which the grant does not operate and which remains in the grantor.—*De Moss v. Sample*, 243.

A "reservation" is the creation in behalf of the grantor of some new right issuing out of the thing granted, usually an incorporeal hereditament; something which did not exist as an independent right before the grant.—Id.

What is meant by a "deed valid in form" or prima facie translativ of property is one that has no defects apparent upon its face.—*Delouche v. Rosenthal*, 581.

## SCHOOLS AND SCHOOL DISTRICTS.

Appellate jurisdiction of supreme court in proceedings to compel admission of child to school, see Courts, § 2.  
Prescription against state for school land, see Prescription, § 4.

### § 1. Public schools.

The state, holding land as trustee for schools, could not divert it from its trust purpose, and transfer it to a drainage board for drainage purposes, either by direct act of donation, or

through the medium of an estoppel.—*State v. New Orleans Land Co.*, 858.

Land not awarded as school land by the Land Department did not belong to the state and was not subject to be alienated by it, by direct deed or through the medium of an estoppel.—Id.

A private asylum for destitute girls could not transfer land of the state or of the public schools to board of commissioners of a drainage district, created by Act No. 165 of 1858, in payment of any debt it might owe, though the debt was due in part for drainage of the land.—Id.

As between state and schools, title to fractional section of land, for all purposes of suit by state against claimant of land, must be held to be in schools; Land Department having so adjudicated title, and state not having appealed.—Id.

## SELECTIVE DRAFT LAW.

Forfeiture of other office by acceptance of membership in draft board, see Officers, § 1.

## SELF-DEFENSE.

See Homicide, § 3.

## SEPARATE ESTATE.

Of married woman, see Husband and Wife, § 3.

## SEPARATION.

See Divorce and Separation from Bed and Board.

## SEQUESTRATION.

Appealability of order for dissolution, see Appeal, § 1.

Basis of action for conversion, see Trover and Conversion, § 1.

Suspensive appeal, see Appeal, § 5.

Petition alleging that defendant unlawfully trespassed upon plaintiffs' premises, took unlawful possession of plaintiffs' property on a writ of sequestration, and moved it from the premises to defendant's place of business, *held* to state a cause of action.—*Oubre v. Katz*, 501.

In action for trespass in illegally entering plaintiffs' home and taking illegal possession of their personal property, a plea of estoppel to part of petition asking damages for wrongful issuance of a writ of sequestration was properly sustained, where plaintiffs had paid the claim demanded in that suit.—Id.

In an action for trespass on plaintiffs' premises, and the taking possession of and removal of their property, a plea of estoppel based on

plaintiff's payment of a demand in a sequestration suit was wrongfully sustained, as to the claim for damages from the trespass.—*Id.*

On defendant's motion for dissolution of a writ of sequestration, and in the alternative that he be allowed to bond, the trial court must allow defendant to bond, since plaintiff can desire no more than such security.—*Nieto v. Hay*, 648; *In re Hay*, *Id.*

Where property rights are involved and it is necessary to maintain the status quo, a judicial sequestration is often the only safe manner of conserving the rights of the parties.—*Davenport v. Sterling Lumber Co.*, 671; *In re Davenport*, *Id.*

Trial judge has a discretion in setting aside a judicial sequestration on bond, as before permitting a party to set aside the sequestration he must necessarily believe that his action will not cause irreparable injury to the other.—*Id.*

## SERVANTS.

See Master and Servant.

## SERVICES.

See Master and Servant, § 2.

## SERVITUDE.

See Dedication; Highways.

## SETTING ASIDE.

Injunction, see Injunction, § 3.

## SEWERAGE BOARD.

As a municipality, see Municipal Corporations, § 2.

## SEWERS.

Defects or obstructions, see Municipal Corporations, § 6.

## SHERIFFS AND CONSTABLES.

Appellate jurisdiction of supreme court of proceedings for forfeiture of right to office, see Courts, § 2.

Sheriff's deed, see Execution, § 1.

Validity of contract with sheriff as affected by public policy, see Contracts, § 1.

### § 1. Appointment, qualification, and tenure.

Under Const. art. 191, suit against sheriff to forfeit his office, because he had received and

used a free pass or accepted discriminatory passenger rates, was properly brought by Attorney General or district attorney.—*Coco v. Oden*, 718.

### § 2. Powers, duties, and liabilities.

Sheriff is not liable for damages for personal injury to a citizen inflicted recklessly by a deputy sheriff, unless it was done in violation of an official duty or in an unfaithful and improper performance of an official act.—*Sanders v. Humphries*, 43.

### § 3. Liabilities on official bonds.

Surety on sheriff's official bond prescribed by Act No. 52 of 1880 is not liable for damages for personal injury to citizen inflicted recklessly by a deputy sheriff, unless it was done in violation of an official duty or in an unfaithful and improper performance of an official act.—*Sanders v. Humphries*, 43.

Allegations in petition against sheriff and surety on his bond, prescribed by Act No. 52 of 1880, that deputy maliciously and recklessly shot and wounded plaintiff, not charging that deputy's act was in violation of an official duty or an improper performance of an official act, did not show cause of action.—*Id.*

## SIDEWALKS.

See Municipal Corporations, § 6.

Liability for injuries from excavation made by independent contractor, see Master and Servant, § 4.

## SIGNATURES.

To taxpayer's return, see Taxation, § 4.

## SIMULATION.

The revocatory action lies when the sale complained of was made by judicial process, or by convention of the parties.—*Swain v. Kirkpatrick Lumber Co.*, 30.

Even if a creditor's allegations in an action against an alleged fraudulent debtor are inconsistent, the defendant's recourse is by compelling plaintiff to elect and to dismiss his whole demand only in case of failure to elect.—*Hibernia Bank & Trust Co. v. Louisiana Ave. Realty Co.*, 962; *Interstate Trust & Banking Co. v. Same*, 971.

Where a creditor charges that a debtor entered into fraudulent real or fraudulent sham contracts, it knows not which, and prays that they be declared void, the creditor is not debarred on the ground of inconsistency from demanding that the contracts, if sham, be decreed void.—*Id.*

A creditor who believes that his debtor disposed of his property with fraudulent intent, but is without means of knowing whether the debtor has done so for a real consideration with a purchaser's connivance, or has merely

executed a paper title as a sham, may attack such transaction in a single action by pleading his cause in the alternative.—Id.

Under Civ. Code, arts. 1971, 1987, 1993, a creditor's suit based on his debtor's frauds not begun until more than a year after such alleged frauds is prescribed.—Id.

Under Civ. Code, arts. 1971, 1987, 1993, a debtor's alleged frauds committed prior to the indebtedness upon which the creditor declares gave the creditor no right of action.—Id.

A "simulated contract" is one which, though clothed in concrete form, has no existence in fact, and it may at any time, and at the demand of any person in interest, be declared a sham, and may be ignored by creditors of the apparent vendor.—Id.

## SITUS.

Of property for purpose of taxation, see Taxation, §§ 2, 3.

## SLANDER.

See Libel and Slander.

## SLAVES.

Emancipation Proclamation of January, 1863, and La. Const. 1864, abolishing slavery did not affect Civ. Code 1838, art. 95, prohibiting marriages between free white persons and free people of color, so that contract of marriage in 1865 attempting to acknowledge and legitimate children of white man and colored woman, born when marriage was prohibited, was of no effect.—Succession of Mingo, 298; Delpit v. Canal Bank & Trust Co., Id.

Statement in contract of marriage that child born to the former slave and her master before their legitimate union were by such act legitimized was insufficient to identify the children either as to parentage, number, or name.—Id.

## SPANISH GRANTS.

See Public Lands, § 4.

## SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

## SPUR TRACKS.

See Railroads, § 3.

## STARE DECISIS.

See Courts, § 1.

## STATE.

See Escheat.

Exemption of state property from taxation, see Taxation, § 2.

Public lands, see Public Lands.

Purchase of property at tax sale, see Taxation, § 7.

Canals and state property held therewith, see Canals, § 1.

Courts, see Courts.

Prescription against, see Prescription, § 4.

Transfer to drainage district of land held in trust for schools, see Schools and School Districts, § 1.

### § 1. Actions.

A citizen's suit for possession of real property or to enforce a real right against officers or agents of the state who assert title and possession in state's behalf, is not a suit against the state within Const. U. S. Amend. 11.—Richardson v. Liberty Oil Co., 130.

Sale of state's land under judgment against private asylum for destitute girls would be a nullity.—State v. New Orleans Land Co., 858.

## STATUTE OF FRAUDS.

Statute of frauds, see Frauds, Statute of.

## STATUTE OF PRESCRIPTION.

See Prescription.

## STATUTES.

See Constitutional Law.

For statutes relating to particular subjects, see the various specific topics.

Laws impairing obligation of contracts, see Constitutional Law, § 3.

Validity of retrospective and ex post facto laws, see Constitutional Law, § 4.

### § 1. Subjects and titles of acts.

Employers' Liability Act expresses the object in its title, to which object everything contained in the act is germane, and hence is not unconstitutional because containing more than one object, and because several objects contained therein are not expressed in its title.—Boyer v. Crescent Paper Box Factory, 368.

Single object of the Revenue Law is to obtain a revenue for the state by taxation, and section 56, providing against obstructions by improvident injunctions, is germane to the object, and not repugnant to Const. art. 31, declaring every act shall have one object, expressed in title.—Tremont Lumber Co. v. May, 389; Louisiana Central Lumber Co. v. Same, 420; Davis Bros. Lumber Co. v. Same, Id.

Title to Act No. 31 of 1886, defining disturbances of the peace in public streets and on

highways or near private houses, etc., held to express the object embraced in the act.—*State v. Penten*, 539; *In re Penten*, Id.

Act No. 187 of 1912, entitled "An act in reference to defenses in suits for damages for personal injury," not referring to public service corporations, although such corporations only are dealt with in the act, does not express the object of the act.—*Mason v. New Orleans Terminal Co.*, 616.

### § 2. Repeal, suspension, expiration, and revival.

When statute has been amended and re-enacted, any part of amended act omitted from amending and re-enacting statute is thereby repealed.—*State ex rel. Brittain v. Hayes*, 39.

### § 3. Construction and operation.

In the construction of laws, a court is not bound to a literal interpretation, where it would lead to an absurdity, or to a plain violation of the spirit and purpose of the enactment.—*State v. Joseph*, 428.

The practical construction given to a doubtful statute by public officers of state, and acted upon by the people thereof, is to be considered, and is perhaps decisive in cases of doubt, as being similar in effect to a course of judicial decisions.—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; *In re Central Bank & Trust Co.*, Id.

The Legislature is presumed to be cognizant of the practical construction of a doubtful statute by public officers and by people, and, after long continuance without legislative dissent, courts will consider themselves warranted in adopting that construction.—Id.

## STAY.

Of proceedings on appeal, see Appeal, §§ 5, 8.

## STIPULATIONS.

Consent to judgment, see Judgment, § 3.

## STREET RAILROADS.

Carriage of passengers, see Carriers, § 2.

### § 1. Regulation and operation.

Under Act 171 of 1898, § 10, as amended by Act No. 103 of 1900, corporation operating electric railroad in city or town of less than 50,000 is liable for annual state license based on gross annual receipts, of which it is not relieved because it is doing an interurban business.—*Henderson v. Southwestern Traction & Power Co.*, 170.

Under Act No. 171 of 1898, § 19, tax collector has burden of establishing basis for judgment for payment of license tax imposed by such act.—Id.

Where electric railroad conducts any business in city or town tax collector is entitled under Act No. 171 of 1898, § 19, to judgment for \$15 as annual license, though amount of gross annual receipts is not shown, and under sections 26 and 28 to a judgment for interest and attorney's fees.—Id.

A motorman is justified in assuming, even until it is too late to avoid an accident, that one approaching the track and whose view is obstructed will heed the apparent danger and have some regard for his own safety.—*Sammons v. New Orleans Ry. & Light Co.*, 731.

If street car was being run too fast when approaching a street, which danger was apparent to a pedestrian whose subsequent negligence was direct cause of fatal injury he had last clear chance to avoid the accident, and his children could not recover.—Id.

## STREETS.

See Highways; Municipal Corporations, §§ 5, 6. Dedication of, see Dedication.

## SUA SPONTE.

Dismissal of appeal, see Appeal, § 7.

## SUCCESSION.

See Escheat; Homestead, § 1; Wills.

Appellate jurisdiction of Supreme Court on questions of legitimacy, see Courts, § 2. Prescription against debt of, see Prescription, § 3.

Right of heir to purchase hereditary effects, see Judicial Sales.

### § 1. Persons entitled and their respective shares.

A child born capable of living, being by Civ. Code, art. 186, and according to laws of nature, presumed to have been conceived at least 180 days before its birth, is born in time to receive by inheritance an estate of a person dying within 180 days before its birth.—*Tyler v. Lewis*, 229.

### § 2. Rights and liabilities of heirs and distributees.

One asserting title by inheritance or under a will admitted to probate may prove his status as heir or legatee as well in a direct action for recognition of title or for partition against coheirs or colegatees under universal title, as in probate proceedings.—*Tyler v. Lewis*, 229.

One whose one-fourth interest in a succession had been sold by his mother as his natural tutor during his minority by suit against the purchaser after majority for his share unconditionally accepted the succession and rendered



himself liable for one-fourth of its debts.—*Delouche v. Rosenthal*, 581.

Civ. Code, art. 1030, means that either the right to accept or the right to renounce a succession, whichever right the heir should have exercised within 30 years, is prescribed at the end of that time.—*Genes v. Bowie Lumber Co.*, 811.

Civ. Code, art. 1030, does not mean that both faculty of accepting or of renouncing a succession are prescribed simultaneously as to one and same heir, but thereafter it is only faculty which heir may exercise and has an interest in exercising within 30 years that is prescribed.—*Id.*

If an heir has the exercise of the faculty of accepting a succession, he must exercise such right within 30 years, or the faculty will be prescribed.—*Id.*

Under Civ. Code, art. 1030, establishing a prescription of 30 years, the status of the heir or relation to decedent is irrevocably fixed as either that of an heir or a stranger according to the status at the moment before and when such time expired.—*Id.*

An heir who has not formally accepted a succession nor committed an act making him liable as an heir may exercise either the faculty of accepting or of renouncing a succession at any time within 30 years.—*Id.*

An heir who has renounced a succession may yet accept it within 30 years if it has not been accepted by other heirs and if no rights acquired by third persons by prescription or by lawful dealings with succession representative are prejudiced.—*Id.*

As to a forced heir it is only one who has renounced a succession who stands to lose by prescription the right to accept, and it is only one who has not renounced who can lose by prescription his right to renounce.—*Id.*

A forced heir, particularly a minor when succession was opened, who has not renounced a succession, does not lose by prescription his right of inheritance by not accepting succession within 30 years, as, if he has not renounced, he is presumed to have accepted.—*Id.*

If an heir has the faculty of renouncing a succession, he must, to avoid the deceased's obligations, exercise the faculty within 30 years or it will be prescribed.—*Id.*

No law of the state precludes a person sui juris from waiving the obstacle of illegitimacy and concurring with an illegitimate brother in obtaining a judgment putting them in possession, share and share alike, of the estate of their common parents.—*Succession of Ruffin*, 828.

Where certain heirs carry out a conspiracy to appropriate the property of an estate to exclusion of a coheir, such coheir, though not demanding the more severe penalty imposed by law, is entitled in view of C. C. art. 1029 to

such a judgment against wrongdoers in solido as will insure his share of inheritance.—*Baensch v. Heinich*, 906.

### **§ 3. Administration of the succession — Appointment, qualification, and tenure of administrator.**

Where a husband abandons his wife, and goes and resides with another woman, the wife cannot follow him, and her domicile does not follow his, notwithstanding Civ. Code, arts. 39, 120, and at her death at his former residence she would be domiciled there, in respect to jurisdiction over her succession.—*Succession of Lasseigne*, 1095.

## **SUMMARY PROCEEDINGS.**

To determine sufficiency of sureties on injunction bond, see *Injunction*, § 3.

## **SUMMONS.**

See *Process*.

## **SUPERSEDEAS.**

On appeal or writ of error, see *Appeal*, § 5.

## **SUPERVISORY JURISDICTION.**

See *Courts*, § 2.

## **SUPPLEMENTAL PLEADING.**

See *Pleading*, § 5.

## **SUPPLEMENTAL TRANSCRIPT.**

On appeal, see *Appeal*, § 6.

## **SUPREME COURTS.**

See *Courts*, §§ 2, 3.

Appellate jurisdiction in criminal prosecutions, see *Criminal Law*, § 14.

Jurisdiction of suits involving alimony, see *Divorce and Separation from Bed and Board*, § 3.

## **SURETYSHIP.**

See *Bail*.

Sureties on bonds of sheriffs or constables, see *Sheriffs and Constables*, § 3.

Sureties on injunction bonds, see *Injunction*, § 3.

### **§ 1. Nature and extent of liability of surety.**

Acts committed by cashier of national bank held to amount to embezzlement within terms of

a surety bond covering his embezzlement or larceny.—Union Nat. Bank v. United States Fidelity & Guaranty Co., 329.

### § 2. Remedies of creditors.

In action against defendants in solido upon a bond, plaintiff's evidence held to sustain burden of overcoming defendants' denial of their signatures.—O'Reilly v. Irwin, 81.

Petition held to show a cause of action against surety on bond of cashier of national bank, conditioned to reimburse bank for any loss from cashier's fraud or dishonesty amounting to embezzlement or larceny.—Union Nat. Bank v. United States Fidelity & Guaranty Co., 329.

Petition in action against surety on bond of national bank cashier covering his embezzlement or larceny need not be phrased in technical language used in an indictment or information charging embezzlement or larceny.—Id.

## SURGEONS.

See Physicians and Surgeons.

## SUSPENSION.

Of prescription, see Prescription, § 3.

Of proceedings on appeal, see Appeal, §§ 5, 8.

## SUSPENSIVE APPEALS.

See Appeal, §§ 4, 5.

## SWAMP LANDS.

See Public Lands, § 1.

## TANK LINE COMPANIES.

Taxation of, see Taxation, §§ 2, 3.

## TAXATION.

Appellate jurisdiction of action involving legality of tax, see Courts, §§ 2, 3.

Assessments for municipal improvements, see Municipal Corporations, § 3.

Collateral attack on judgment annulling tax sale, see Judgment, § 4.

Exception of no cause of action in contesting action of board of review, see Pleading, § 4.

Highway taxes, see Highways, § 1.

License taxes in general, see Licenses, § 1.

License taxes, on street railroads, see Street Railroads, § 1.

Municipal taxes, see Municipal Corporations, § 7.

Subject and title of statutes, see Statutes, § 1.

### § 1. Nature and extent of power in general.

Legislation as to taxation of banks is responsive to federal legislation (Rev. St. U. S. § 5219 [U. S. Comp. St. 1916, § 9784]), permitting state to tax shares in national banks to reach capital of banks as property of stockholders, and place burden of state taxation equally on national and state banks.—In re Feliciana Bank & Trust Co., 46.

For property with no fixed situs, as rolling stock used on railroads, Legislature may fix assessment situs.—Union Tank Line Co. v. Day, 771.

### § 2. Liability of persons and property.

Theater of fraternal order used for fraternal purposes, hall being also used for picture shows and theatrical performances, and rooms being leased as stores, was not exempt from taxation under Const. art. 230.—Elks Theater Co. v. City of New Iberia, 162.

New Jersey tank line company, whose business is leasing tank cars to railroads, business of operating cars being that of lessees, and company having no office, place of business, agent, or employé in Louisiana, is not "doing business" in state within Act No. 281 of 1914, § 1, authorizing assessment of rolling stock of foreign corporations doing business in state.—Union Tank Line Co. v. Day, 771.

State property is impliedly excepted when authority is given to levy a tax.—State v. New Orleans Land Co., 858.

A vessel engaged in overseas trade ceases to be a seagoing vessel when wrecked and sunk and sold by owners, and then becomes simply valuable wreckage, subject to assessment and taxation as property of new owner within the state, and was not exempt under amendment to Constitution adopted November 7, 1916 (see Acts 1917 [Extra Sess.] No. 253).—Thompson v. Day, 1086.

### § 3. Place of taxation.

Property can be assessed only in taxing district within which it is situated.—Union Tank Line Co. v. Day, 771.

State board of appraisers could not assess, as if situated in parish of East Baton Rouge, tank cars of tank line company leased to railroads and distributed over railroads throughout state.—Id.

### § 4. Levy and assessment.

The fact that a property owner had, for several years, paid a tax unlawfully imposed, does not necessarily estop him to deny its legality and refuse to continue such payments.—Hayne v. Assessor, 697; Natalie Oil Co. v. Same, Id.

Under Act No. 182 of 1906, § 3, requiring taxpayers' sworn return of property for assessment, and Act No. 170 of 1898, §§ 15, 18, prescribing form of oath, a return bearing signature of a law firm, with name of an individual underneath it, not written by own-

er, but by clerk of court, and having the word "agents" added thereto, was insufficient.—Id.

Under Act No. 182 of 1906, § 3, an owner failing to make return of his property for assessment, in the manner and within the time required by law, is estopped to contest the correctness of assessment as made by assessor, or by the assessor in concurrence with the board of review.—Id.

Under Act No. 170 of 1898, § 56, in view of Const. arts. 125, 180, and Act No. 125 of 1912, the allowance of a fee to be taxed as costs for the benefit of the attorney at law who successfully represents the state in a suit which delays the collection of taxes, though he be the district attorney was proper.—Id.

### § 5. Payment and refunding or recovery of tax paid.

Tax prescribed by Act No. 170 of 1898, § 27, is on shares of bank as property of shareholders, and liability for tax is that of shareholders, not of the bank, which is merely an agency through which tax is collected.—In re Feliciana Bank & Trust Co., 46.

Under Act No. 170 of 1898, §§ 1, 30, 34, 35, 40, 71, making amount of tax against shareholders of bank dependent on valuation placed on shares by taxing authorities, bank as agent for collection is not required to appropriate or apply any funds of stockholders to payment of taxes before such valuation.—Id.

As to functions of bank as agent for payment of taxes upon its shareholders and their shares under statute, an assessment is completed and taxes ascertained only on deposit of tax rolls by the assessor.—Id.

Proceeding by state against liquidating of insolvent bank to collect taxes assessed against its shareholders under statute cannot be maintained, where it is not alleged or proved that liquidator has, or that bank had, any assets of shareholders.—Id.

### § 6. Collection and enforcement against persons or personal property.

Provisions of Code of Practice, authorizing and requiring issuance of injunctions there specified, do not control those of the Revenue Law, prohibiting issuance of injunctions restraining collection of taxes except on conditions prescribed, and repealing all laws in conflict or inconsistent.—Tremont Lumber Co. v. May, 389; Louisiana Central Lumber Co. v. Same, 420; Davis Bros. Lumber Co. v. Same, Id.

Injunction against collection of taxes being merely ancillary to Louisiana suit to contest assessment, there is no ground for injunction when suit to contest has not been filed in time.—Id.

Under Revenue Law, § 56, in suit to contest assessment, injunction against sale of property was properly dissolved where its issuance was not preceded by rule nisi.—Id.

To entitle tax debtor to injunction restraining collection of taxes, he must show he has paid portion admitted to be due, and exhibit and file receipt, and must proceed against collector by rule nisi, and obtain order for injunction after hearing.—Id.

Under Revenue Law, there is no ground for injunction against collection of taxes in suit to contest assessment until uncontested part of taxes has been paid, and collector's receipt produced.—Id.

Where lumber company contesting assessment tendered amount of taxes not contested by it on condition that receipt in full be given tender was pretense and futile to give company right to injunction against collection of taxes in suit contesting assessment.—Id.

Penalty on uncontested part of taxes under Revenue Law, § 56, requiring party contesting assessment, if defeated, must pay, as attorney's fee, 10 per cent. on amount of taxes, should not be imposed in case of doubt, whether plaintiff tendered uncontested part unconditionally or conditionally.—Id.

In action to enjoin a sale for taxes, only those irregularities charged against the assessment which are alleged in petition will be considered by the court; especially where there is no evidence to support irregularities alleged in argument.—Thompson v. Day, 1086.

### § 7. Sale of land for nonpayment of tax.

Where property of vacant succession forfeited and sold to state for taxes due, prior to December 31, 1879, was sold by state in 1894, under Act No. 82 of 1884, purchaser complying with such act and paying all taxes thereafter due acquired good title as against state.—Puyoulet v. Gehrke, 315; In re Gehrke, Id.

The sole object of the state in selling property for taxes is to collect its revenues, and not to destroy rights farther than is absolutely necessary to effect such collection.—Richards v. Nyika Land Co., 650.

Property acquired by the state of Louisiana at a tax sale is legally acquired.—Ebert v. Woodville, 874.

The state is not equitably estopped from claiming title because of a void judgment canceling the act of sale to it, or because the assessor and tax collector have continued to assess the property to the former owner and to collect taxes from him.—Id.

### § 8. Redemption from tax sale.

The words "owner or any person interested personally," as used in section 62 of Act No. 170 of 1898 in defining persons entitled to redeem property sold for taxes, mean not only one who owns by perfect title, but also one who possesses as owner.—Richards v. Nyika Land Co., 650.

One who has been in the quiet, open, and continuous possession as owner of land for a

number of years is entitled, on complying with the conditions required by law, to redeem properties sold for taxes.—*Id.*

### § 9. Tax titles.

Doctrine that three-year prescription under Const. art. 233, is not a statute of repose in favor of holder of invalid tax title while original owner is in actual possession cannot defeat claim of owner of one-fourth interest in tax title suing one who acquired claim of such owner, and who previously acquired possession from holders of remaining interest.—*Baronet v. Houssiere*, 72.

Where no notice of delinquency was served on owner, tax sale was nullity.—*Arnold v. Sauer*, 188.

## TELEGRAPHS AND TELEPHONES.

### § 1. Regulation and operation.

It is against public policy and Const. art. 191, for public officers to accept or receive discriminatory rates from telegraph and telephone companies.—*Coco v. Oden*, 718.

## TENANCY IN COMMON.

### § 1. Mutual rights, duties, and liabilities of co-tenants.

Possession of property by an usufructuary as such is for the benefit of all of the co-owners, and cannot serve as a basis for the plea of prescription of 10 years, urged by one or some of the co-owners against another of them.—*Tyler v. Lewis*, 229.

## TERMS.

Of leases, see *Landlord and Tenant*, § 1.

## TESTAMENT.

See *Wills*.

## TESTAMENTARY POWERS.

Restrictions on power to devise or bequeath, see *Wills*, § 1.

## THEATERS AND SHOWS.

Taxation of, see *Taxation*, § 2.

## TIME.

Allegations and proof of in prosecution for homicide, see *Homicide*, § 4.  
For filing record on appeal, see *Appeal*, § 6.  
For return of appeal from railroad commission, see *Railroads*, § 1.

For suit to set aside or alter orders of railroad commission, see *Carriers*, § 1.  
For taking appeal, see *Appeal*, §§ 1, 4.

## TITLE.

See *Escheat*.

Color of title, see *Prescription*, § 4.

Estoppel affecting, see *Estoppel*, § 2.

Of purchaser at tax sale, see *Taxation*, § 7.

Of purchaser of property of minor, see *Minors*, § 2.

Of state acquired by tax sale, see *Taxation*, § 7.

Of statutes, see *Statutes*, § 1.

Slander of title, see *Libel and Slander*, § 4.

Sufficiency of title of vendor of land, see *Sales*, § 7.

Tax titles, see *Taxation*, § 9.

To mineral rights, see *Mines and Minerals*, § 1.

To support petitory action, see *Petitory Action*.

To sustain right to redeem from tax sale, see *Taxation*, § 8.

## TORTS.

Causing death, see *Death*, § 1.

*Liabilities of particular classes of persons.*

See *Master and Servant*, §§ 3, 4; *Municipal Corporations*, § 6.

Agents, see *Mandate*, § 1.

*Particular torts.*

See *Libel and Slander*; *Negligence*; *Nuisance*; *Trover and Conversion*.

Injuries to servants, see *Master and Servant*, § 3.

*Remedies for torts.*

See *Damages*; *Trover and Conversion*, § 1.

## TOWNS.

See *Municipal Corporations*.

## TRADE UNIONS.

In accepting a charter from the parent labor brotherhood, a local union did so subject to all the conditions on which it was granted as contained in the constitution and other laws of the brotherhood.—*Local Union No. 76 of United Brotherhood of Carpenters and Joiners of America v. United Brotherhood of Carpenters and Joiners of America*, 901.

Controversies between local unions of national labor brotherhood must be settled within the brotherhood by its tribunals in the modes provided for that purpose by its constitution and by-laws.—*Id.*

Judgment of tribunal of labor brotherhood on charges of locals against another, not being

null, so far as authorizing officers to sequester property of local, or as cutting off local members from brotherhood membership, until it could be reviewed on appeal, the local could not apply to the courts to arrest it or review it; that being a condition of its charter.—*Id.*

## TRAFFIC CONTRACTS.

Between railroads, see Railroads, § 2.

## TRANSCRIPTS.

Of record for purpose of review, see Criminal Law, § 14.

## TRANSFER OF CAUSES.

Between Supreme Court and Court of Appeal, see Courts, §§ 2, 3.

## TRANSITORY ACTIONS.

See Venue, § 1.

## TRESPASS.

Decision on former appeal as law of the case, see Appeal, § 9.

Negligence causing injuries to trespasser, see Negligence, § 1.

Prescriptive rights of trespassers, see Prescription, § 1.

Wrongful sequestration, see Sequestration.

## TRIAL.

See New Trial.

Of action, for causing death, see Death, § 1.

Of criminal prosecutions, see Criminal Law, §§ 11, 12; Homicide, § 6.

Summoning and impaneling jury, see Jury, § 1.

Witnesses, see Witnesses.

### § 1. Reception of evidence.

Regardless of proper interpretation of Code Prac. art. 325, when construed with Civ. Code, art. 2245, testimony admitted without objection to overcome defense that instrument sued on has been forged is to be considered as in other cases where acknowledgment is relied on.—*O'Reilly v. Irwin*, 81.

That which one litigant admits the opposing party is not ordinarily required to prove.—*Cousin v. Schmidt*, 843; *In re Schmidt*, *Id.*

## TROVER AND CONVERSION.

### § 1. Actions.

One obtaining a sequestration of lumber manufactured by an adverse claimant of timber

after writ was dissolved and timber manufactured cannot maintain action against adverse claimant for possession of lumber or for its value merely on his allegation of possession as owner.—*Burton-Swartz Cypress Co. v. Baker-Wakefield Cypress Co.*, 686.

## TRUST DEEDS.

See Mortgages.

## TRUSTS.

Power of wife to convey paraphernal property in trust, see Husband and Wife, § 1.

### § 1. Creation, existence, and validity.

Contract intended to establish trust estate is prohibited and unenforceable in Louisiana.—*Marks v. Loewenberg*, 196.

## UNDERTAKING BUSINESS.

Injunction against carrying on business, see Injunction, § 2.

Power of city to prohibit business on residence streets, see Municipal Corporations, § 4.

## UNIONS.

See Trade Unions.

## UNITED STATES.

Public lands, see Public Lands, § 1.

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## VACANCY.

In office, see Officers, § 1.

## VACATION.

Of injunction, see Injunction, § 3.

Of sequestration, see Sequestration.

## VALUE.

Limits of jurisdiction, see Courts, § 2.

## VENDOR AND PURCHASER.

See Sales.

## VENUE.

Of criminal prosecutions, see Criminal Law, § 8.

### § 1. Nature or subject of action.

The district court has no jurisdiction of a proceeding in rem against property of a citizen domiciled in an adjoining parish, unless under Code Prac. art. 163, as amended by Act No. 64 of 1876, plaintiff has a right to a writ of sequestration or provisional seizure.—*J. J. Stovall & Sons v. Hubier*, 1028; *In re Hubier*, Id.

## VESSELS.

Situs for purpose of taxation, see Taxation, § 2.

## VESTED RIGHTS.

Protection, see Constitutional Law, § 2.

## VICE PRINCIPALS.

See Master and Servant, § 3.

## VILLAGES.

See Municipal Corporations.

## VOTERS.

See Elections.

## WAGES.

See Master and Servant, § 2.

## WAIVER.

See Estoppel.

Of demand for compensation under Employers' Liability Act, see Master and Servant, § 5.

Of order for appeal, see Appeal, § 4.

Of right to appeal, see Appeal, § 2.

Of right to avoid or forfeit insurance policy, see Insurance, § 3.

## WARNING.

Of danger to servant, see Master and Servant, § 3.

## WARRANTY.

By insured, see Insurance, § 1.

Covenants of, see Covenants, § 1.

## WATER BOARD.

As a municipality, see Municipal Corporations, § 2.

## WATERS AND WATER COURSES.

See Canals; Drains; Levees.

Water courses in cities, see Municipal Corporations, § 6.

## WAYS.

Public ways, see Highways; Municipal Corporations, §§ 5, 6.

## WELLS.

Oil or gas wells, see Mines and Minerals, § 1.

## WILLS.

See Succession.

Testamentary disposition as basis of prescription, see Prescription, § 4.

### § 1. Nature and extent of testamentary power.

A child born capable of living, being by Civ. Code, art. 186, and according to laws of nature, presumed to have been conceived at least 180 days before its birth, is born in time to receive, by testamentary disposition, an estate of a person dying within 180 days before its birth.—*Tyler v. Lewis*, 229.

### § 2. Probate, establishment, and annulment.

Plea of prescription of 5 years, based on Civ. Code, art. 3542, which may be pleaded against action for nullity of testament, does not apply to a partition suit, wherein plaintiff claims title under a testament and asks its interpretation in her favor.—*Tyler v. Lewis*, 229.

The legatees named in a will are necessary parties to a proceeding to have the will declared void.—*Succession of McMahon*, 644.

An order for registry and execution of a will, made in the common as distinguished from the solemn form of probate, is merely preliminary, and a direct action to annul it need not be brought as a condition precedent to a suit in the same court attacking the validity of a particular disposition.—*Succession of Manion*, 799.

### § 3. Construction.

Under Civ. Code, arts. 29, 953, 954, 957, 1473, and 1482, a will devising all property owned at testator's death to his grandchildren, included a grandchild born several years after date of will and on 172d day after death of testator.—*Tyler v. Lewis*, 229.

A testamentary disposition in favor of a designated class collectively is not on its face a transfer of title to any particular or designated member or members of the class.—Id.

Codicils having been freed from the restrictions under the definition contained in the Code of 1808, art. 83, are not different from the

codicils which are elsewhere known and defined as "an addition or qualification to a will and a part of the will."—*Succession of Manion*, 799.

Where testator leaves disposable part of estate to particular heir, his declaration that he does not intend such "extra portion" to compensate the legatee for services as executor fixes status of legacy as an extra portion, not intended to be collated.—*Id.*

Civ. Code, art. 1300, authorizing testator to order that bequests shall not be divided within a maximum period of five years, can have no application to legitimate of forced heirs, as the paramount title comes from the law, and a bequest is merely an acquiescence in that which the law ordains.—*Id.*

## WITNESSES.

See Evidence.

Compelling voter to divulge for whom he voted, see Elections, § 1.

Harmless error in examination of in criminal prosecution, see Criminal Law, § 14.

### § 1. Examination.

The rule of evidence forbidding leading questions must yield to the discretion of the trial judge in the examination of a very young or timid witness.—*State v. Williams*, 424.

Objections to district attorney's cross-examination of defendant's witness were without merit, where it was as to a matter as to which he had testified for the defense.—*Id.*

## WORDS AND PHRASES.

"Acquiescence in judgment."—*Raines v. Dunson*, 321.

"Action in personam."—*Beck v. Natalie Oil Co.*, 153.

"Actually imposed."—*State v. Desimone*, 505.

"After the contract has been awarded."—*Town of Winnfield v. Collins*, 493.

"Agreement for sale."—*Maloney v. Aschaffenburg*, 509.

"Agricultural pursuits."—*State ex rel. Brittain v. Hayes*, 39.

"Any crime punishable with imprisonment at hard labor for seven years or upwards."—*State v. Culberson*, 565.

"Attractive appliance doctrine."—*Fincher v. Chicago, R. I. & P. Ry. Co.*, 164.

"Blind tiger."—*State v. Maggiore*, 463.

"Clerk."—*Salaun v. Consolidated Realty & Mfg. Co.*, 593.

"Codicil."—*Succession of Manion*, 799.

"Construction."—*Morgan's Louisiana & T. R. & S. S. Co. v. Himalaya Planting & Mfg. Co.*, 460.

"Deed valid in form."—*Delouche v. Rosenthal*, 581.

"Delinquent child."—*State v. Ebarbo*, 591.

"Deliver for shipment."—*State v. Lieber*, 158; *In re State ex rel. Ellis*, *Id.*

"Disturbance of peace."—*State v. Penten*, 589; *In re Penten*, *Id.*

"Doing business."—*Union Tank Line Co. v. Day*, 771.

"Due process of law."—*City of New Orleans v. White*, 487.

"Each business."—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; *In re Central Bank & Trust Co.*, *Id.*

"Embezzlement."—*Union Nat. Bank v. United States Fidelity & Guaranty Co.*, 329.

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"Free pass."—*Coco v. Oden*, 718.

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"Govern."—*State ex rel. Tate v. Brooks-Scanlon Co.*, 539; *In re Brooks-Scanlon Co.*, *Id.*

"Hawkers."—*State ex rel. Brittain v. Hayes*, 39.

"Independent contractor."—*Swain v. Kirkpatrick Lumber Co.*, 30.

"Insolvency proceeding."—*In re Receivership of Cotton Queen Oil Co.*, 1; *Intervention and Opposition of Grigsby*, *Id.*

"Intent to injure or defraud."—*Union Nat. Bank v. United States Fidelity & Guaranty Co.*, 329.

"Immovable."—*Morgan's Louisiana & T. R. & S. S. Co. v. Himalaya Planting & Mfg. Co.*, 460.

"Just and reasonable rate."—*Alexandria & W. Ry. Co. v. Railroad Commission of Louisiana*, 1087.

"Just reason to believe."—*Delouche v. Rosenthal*, 581.

"Keeping blind tiger."—*State v. Maggiore*, 463.

"Last clear chance."—*Tyer v. Gulf, C. & S. F. Ry. Co.*, 177.

"License."—*State ex rel. Guillot v. Central Bank & Trust Co.*, 1053; *In re Central Bank & Trust Co.*, *Id.*

"Malice aforethought."—*State v. Robinson*, 543.

"Maliciously."—*State v. Robinson*, 543.

"Master."—*Congdon v. Louisiana Sawmill Co.*, 209.

"Municipal corporation."—*State v. Servat*, 175.

"Murder."—*State v. Robinson*, 543.

"One year from the time that the contract is awarded."—*Town of Winnfield v. Collins*, 493.

"Ordinary care."—*Tyer v. Gulf, C. & S. F. Ry. Co.*, 177.

"Owner or any person interested personally."—*Richards v. Nylka Land Co.*, 650.

"Peddler."—*State ex rel. Brittain v. Hayes*, 39.

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